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EFFECT OF PRIVACY/FOI ACTS ON RECOMMENDATIONS OF PRESIDENTIAL COMMISSIONS PERTAINING TO LAW ENFORCEMENT RECORD-KEEPING

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Introduction

The question presented for discussion herein is whether an inherent conflict exists between effective preventive law enforcement and investigation and the requirements of recent "open government" legislation such as the Privacy Act of 1974 1/ and the Freedom of Information Act. 2/ Some members of the law enforcement community are convinced that law enforcement intelligence-gathering capabilities have been seriously eroded by the passage of such legislation. 3/ However, other law enforcement personnel, while recognizing the burdens placed on law enforcement agencies by these Acts, also recognize that the Freedom of Information and Privacy Acts have resulted in benefits to Government in general and to the law enforcement process in particular. 4/ In fact, Quinlan J. Shea, Director of the Office of Privacy and Information Appeals, Office of the Deputy Attorney General, makes the following strong statement in defense of Privacy/FOIA legislation:

1/ 5 U.S.C. § 552a.

2/ 5 U.S.C. § 552.

3/ See, The Erosion of Law Enforcement Intelligence Capabilities -- Public Security: Hearings Before the Subcomm. on Criminal Law and Procedures of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 3 (1977) (statement of Eugene Rossides).

4/ See Department of Justice, Statement of Quinlan J. Shea Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary, 2 (March 9, 1978).

> It is the firm and unequivocal position of the Department of Justice that there is no inherent conflict between efficient, effective criminal law enforcement and the principles underlying the Freedom of Information and Privacy Act. We recognize that we are dealing with two very important societal interests -- openness in Government and the valid needs of the law enforcement process. At certain points these interests do conflict to some extent and decisions have to be made as to which is to control. For the most part, however, we believe that each of these important interests can be served without doing violence to the other. 5/

This report will attempt to determine to what extent law enforcement intelligence gathering procedures are hampered by existing provisions of the Freedom of Information and Privacy Acts. In particular, we will review and summarize recommendations for law enforcement intelligence gathering and record-keeping made by four Presidential Commissions and determine to what extent these recommendations would be hindered in implementation by the provisions of the Freedom of Information and Privacy Acts.

5/ Id. at 2.

Recommendations of the President's Commission on the Assassination of President John F. Kennedy 6/

In 1963, following the assassination on November 22, 1963 of President John F. Kennedy, President Lyndon B. Johnson appointed a seven-member Commission to "ascertain, evaluate and report upon the facts relating to the assassination of the late President John F. Kennedy..." 7/ The Chairman of the Commission was Chief Justice Earl Warren. Thus, the report of the Commission is commonly referred to as the Warren Report. The Warren Commission's major function was to investigate the facts surrounding the assassination of President Kennedy and issue a report of that investigation including the Commission's conclusions as to the person or persons responsible for the assassination.

In addition, however, the Warren Commission reviewed and evaluated the protection of the President which was provided by the Secret Service and made recommendations to President Johnson for improving the functioning of the Secret Service in this regard. Relevant to this report are the recommendations of the Commission pertaining to preventive intelligence. 8/

After the assassination, the Secret Service began a reorganization of its research activities, including increasing the staff of the Protective

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6/ Commonly known as and hereinafter referred to as the Warren Commission.

7/ Exec. Order No. 11,130, 3 C.F.R. 795 (1963).

8/ Report of the President's Commission on the Assassination of President John F. Kennedy 461 (1964).

Research Section. And the F.B.I., recognizing that the files of the Protective Research Service should "no longer be limited largely to persons communicating actual threats to the President", 9/ issued new instructions for furnishing information to the Secret Service. The F.B.I. instructions require agents to report immediately to the Secret Service information concerning:

> Subversives, ultrarightists, racists and fascists (a) possessing emotional instability or irrational behavior, (b) who have made threats of bodily harm against officials or employees of Federal, state, or local government or officials of a foreign government, (c) who express or have expressed strong or violent anti-U.S. sentiments and who have been involved in bombing or bomb-making or whose past conduct indicates tendencies toward violence, and (d) whose prior acts or statements depict propensity for violence and hatred against organized government. 10/

Pursuant to this new instruction, the F.B.I. referred more than 5,000 names to the Secret Service in the first 4 months of 1964, and, by mid-June, 1964, approximately 9,000 reports on members of the Communist Party were transferred to the Secret Service. It is important to note that both the Director of the F.B.I., Mr. Hoover, and the Assistant to the Director, Alan H. Belmont, expressed to the Warren Commission "the great concern of the F.B.I., which is shared by the Secret Service, that referrals to the Secret Service under the new criteria might, if not properly handled, result in some degree of interference with the personal liberty of those involved." 11/

9/ Id.

10/ Id.

11/ Id. at 462.

However, recognizing that the new F.B.I. instructions were "a step in the right direction," the Warren Commission recommended that the F.B.I. and the Secret Service develop broader, more selective criteria for the transfer of information from the F.B.I. to the Secret Service.

The Warren Commission also recommended that the Secret Service establish written agreements with each Federal agency and the leading State and local agencies which might be the source of information on potential assassins. The report pointed out that the Secret Service had established a much too casual relationship with the agencies which supply such information. The Report continued:

> ...Such agreements should describe in detail the information which is sought, the manner in which it will be provided to the Secret Service, and the respective responsibilities for any further investigation that may be required. 12/

The final recommendation of the Warren Commission pertaining to the collection and maintenance of information on potential assassins was that the Secret Service automate its investigative files and develop a more sophisticated computerized retrieval system for the information contained therein. 13/ The Commission recognized that the additional data which would be transferred to the Secret Service under the new F.B.I. instructions and pursuant to the written agreements with other agencies as recommended by the Commission would be useless unless the Secret Service

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12/ Id. at 463.

13/ Id. at 464.

were capable of accessing required data efficiently. The Commission also recommended that the automation of the Secret Service 's information system be completed in coordination with other Federal agencies from which it receives information.

Recommendations of the President's Commission on Law Enforcement and Administration of Justice 14/

President Johnson established the Commission on Law Enforcement and Administration of Justice on July 23, 1965. 15/ The Commission was mandated to:

> (1) Inquire into the causes of crime and delinquency, measures for their prevention, the adequacy of law enforcement and administration of justice, and the factors encouraging respect of disrespect for law, at the national, State, and local levels, and make such studies, conduct such hearings, and request such information as it deems appropriate for this purpose.
>
> (2) Develop standards and make recommendations for actions which can be taken by the Federal, State, and local governments, and by private persons and organizations, to prevent, reduce, and control crime and increase respect for law, including, but not limited to, improvements in training and qualifications of personnel engaged in law enforcement and related activities, improvements in techniques, organization, and administration of law enforcement activities, improvements in the administration of justice, improvements in correction and rehabilitation of convicted offenders and juvenile delinquents, promotion of better understanding between law enforcement officials and other members of the community, and promotion of greater respect for law throughout the community. 16/

President Johnson appointed Nicholas deB. Katzenbach, then Attorney General of the United States, to serve as Chairman of the Commission. The Commission made the following recommendations in the areas of personal information and information systems:

14/ Commonly known as and hereinafter referred to as the Katzenbach Commission.

15/ Exec. Order No. 11, 236, 3 C.F.R. 329 (1965).

16/ Id.

The Commission recommends:

Personal criminal-record information should be organized as follows:

There should be a national law enforcement directory that records an individual's arrests for serious crimes, the disposition of each case, and all subsequent formal contacts with criminal justice agencies related to those arrests. Access should be limited to criminal justice agencies.

There should be State law enforcement directories similar to the national directory, but including less serious offenses.

States should consider criminal justice registries that could record some ancillary factual information (e.g., education and employment records, probation reports) of individuals listed in their State directories. This information must be protected even more carefully than the information in the directories, and would be accessible only to court or corrections officers. 17/

The Commission recommends:

A National Criminal Justice Statistics Center should be established in the Department of Justice. The Center should be responsible for the collection, analysis, and dissemination of two basic kinds of data:

Those characterizing criminal careers, derived from carefully drawn samples of anonymous offenders.

Those on crime and the system's response to it, as reported by the criminal justice agencies at all levels. 18/

17/ President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 268 (1967).

18/ Id. at 269.

Additionally, the Commission's report 19/ recommended that the Federal Government assist State and local governments in improving the collection and transmission of information needed by the police, courts, and corrections agencies. The report cited the F.B.I.'s National Crime Information Center which provides "instantaneous response to computer inquiry by local agencies for information on stolen automobiles, wanted persons, certain identifiable types of stolen property, and the like." 20/ However, the Commission recommended that the Federal Government make data on offenders centrally available to prosecutors, courts, and correctional authorities with the goal being to "develop an index drawn from the records of the criminal justice agencies across the country." 21/ The Commission felt that such an index would "avoid the dangers of developing national 'dossiers'" while speeding collection of data.

Finally, the Commission recommended that the Justice Department develop a computerized, central organized crime intelligence system as the center of a Federally-supported network of State and regional intelligence systems. 22/ This system would assist State and local governments in their fight against organized crime and would assist the Department in maintaining statistical information on the criminal justice system.

19/ Supra note 12.

20/ Id. at 286.

21/ Id.

22/ Id.

Recommendations of the National Advisory Commission on Civil Disorders 23/

Following racial disturbances in several major American cities early in 1967, President Johnson established the National Advisory Commission on Civil Disorders. 24/ The President appointed Governor Otto Kerner, of the State of Illinois, as Chairman of the Commission. The Commission was charged with the following responsibilities:

> Sec. 2. Functions of the Commission. (a) The Commission shall investigate and make recommendations with respect to:
>
> (1) The origins of the recent major civil disorders in our cities, including the basic causes and factors leading to such disorders and the influence, if any, of organizations or individuals dedicated to the incitement or encouragement of violence;
>
> (2) The development of methods and techniques for averting or controlling such disorders, including the improvement of communications between local authorities and community groups, the training of State and local law enforcement and National Guard personnel in dealing with potential or actual riot situations, and the coordination of efforts of the various law enforcement and governmental units which may become involved in such situations;
>
> (3) The appropriate role of the local, State and Federal authorities in dealing with civil disorders; and
>
> (4) Such other matters as the President may place before the Commission.
>
> 25/

23/ Commonly knows as and hereinafter referred to as the Kerner Commission.

24/ Exec. Order No. 11,365, 3 C.F.R. 674.

25/ Id.

The major focus of the Kerner Commission Report was to outline the civil disorders as they had occurred in areas such as Tampa, Cincinnati, Atlanta, Newark, Northern New Jersey, Plainfield, New Brunswick, and Detroit, and to provide an analysis of the basic causes of such disorders. Concluding the report, the Kerner Commission offered its recommendations for action to prevent further disorders. The recommendations which were national in scope pertained to social issues such as employment, education, welfare, and housing. And the recommendations which pertained to activities of the police and their response to civil disorder situations dealt mostly with problems such as police-community relations and police response in the middle of the crisis.

However, in a Supplement to the report on methods of controlling a disorder, the Commission did discuss the need for more accurate and sophisticated police intelligence. The Commission recommended that police departments develop intelligence units to gather, evaluate, analyze, and disseminate information on potential as well as actual civil disorders. 26/ The Commission recognized the need for accurate information both before and during a disorder to assist in assessment and decision-making and to prevent the spread of dangerous, often inciting rumors.

Our research indicates that the Kerner Commission Report made no other recommendations pertaining to information gathering or maintenance.

26/ Report of the National Advisory Commission on Civil Disorders 269 (1968).

Recommendations of the National Commission on the Causes and Prevention of Violence 27/

After racial disturbances errupted across the country following the assassination of Dr. Martin Luther King, President Johnson appointed the National Commission on the Causes and Prevention of Violence. 28/ To lead this Commission in its work, the President appointed Dr. Milton Eisenhower. Other Commission members included Congressman Hale Boggs, Archbishop Terence J. Cooke, Ambassador Patricia Robert Harris, and Eric Hoffer. The Commission mandate read as follows:

> Sec. 2. Functions of the Commission. The Commission shall investigate and make recommendations with respect to:
>
> (a) The causes and prevention of lawless acts of violence in our society, including assassination, murder and assault;
>
> (b) The causes and prevention of disrespect for law and order, of disrespect for public officials, and of violent disruptions of public order by individuals and groups; and
>
> (c) Such other matters as the President may place before the Commission.
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> 29/

The Eisenhower Commission completed its work and issued its report in December, 1969. 30/ The report outlines the growth of violence in

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27/ Commonly known as and hereinafter referred to as the Eisenhower Commission.

28/ Exec. Order No. 11,412, 3 C.F.R. 726 (1968).

29/ Id.

30/ National Commission on the Causes and Prevention of Violence, To Establish Justice, To Insure Domestic Tranquility (1969).

American Society and analyzes various forms of violence such as violent crime, group violence, civil disobedience, assassination, firearms, violence in entertainment, and campus disorders. The report is followed by 81 recommendations for action to be taken to limit or prevent violence in America in the future. Of these recommendations, we have identified two which pertain to gathering and maintaining information on individuals.

Recommendation No. 9 urges:

> 9. that we devise means of "identification of specific violence-prone individuals for analysis and treatment in order to reduce the likelihood of repetition; provision of special schools for education of young people with violence-prone histories, special psychiatric services and employment programs for parolees and released offenders with a history of violent criminal acts." 31/

And Recommendation No. 57 suggests:

> 57. that "a federal firearms information center should be established to accumulate and store information on firearms and owners received from state agencies; this information would be available to state and federal law enforcement agencies." 32/

31/ Id. at 272.

32/ Id. at 279.

The Privacy Act of 1974 -- Provisions Relating to Law Enforcement Recordkeeping

As early as 1965, Congress began to consider the problems of the privacy of individuals and how to protect it. In that year the House of Representatives Special Subcommittee on Invasion of Privacy held public hearings. Numerous congressional committee hearings have been held and reports issued since that time. 33/ In 1973, the Department of Health, Education, and Welfare issued a report which greatly influenced the development of the Privacy Act. 34/ The HEW Report recommended a "Code of Fair Information Practice" which would prohibit secret data record-keeping systems, provide access by individuals to records about themselves, limit the uses to which collected information could be put with individual consent, provide for correction and amendment of records, and require reasonable accuracy of records. 35/ All of these provisions were incorporated in the Privacy Act of 1974.

33/ See Privacy, The Census and Federal Questionnaires: Hearings on S. 1791 Before the Subcomm. on Const. Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969); Federal Data Banks, Computers and the Bill of Rights: Hearings Before the Subcomm. on Const. Rights of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. (1971); Staff of Subcomm. on Const. Rights of the Senate Comm. on the Jucidiary, 93d Cong., 2d Sess., Federal Data Banks and Constitutional Rights (Comm. Print 1974).

34/ See Department of Health, Education, and Welfare, Records, Computers, and the Rights of Citizens (Report of the Secretary's Advisory Committee on Automated Personal Data Systems, 1973).

35/ Id. at 41.

After extensive debate, the Senate passed S. 3418 and the House of Representatives passed H.R. 16373 late in 1974. Following informal negotiations, a compromise bill was drafted which subsequently was passed by both the House and the Senate and signed into law by the President as Public Law No. 93-579.

The Privacy Act of 1974 36/ is a statute which regulates the collection, maintenance and dissemination of personally-identifiable information by Federal agencies. The act pertains to records which are retrievable by the name of an individual or by some other individually identifiable data. Each agency must publish annually in the Federal Register a listing of the record systems which it maintains. The individual identified in the record must be granted a right of access to the file concerning himself and must be given a right to challenge the accuracy of the information contained therein. Records may be disclosed to third parties only upon written request by, or with the prior consent of, the individual to whom the record pertains. Pertinent to a discussion of record-keeping by law enforcement agencies, the Privacy Act requires that agencies:

1. "(C)ollect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs," 37/

36/ 5 U.S.C. § 552a.

37/ 5 U.S.C. § 552a(e)(2).

2. "(M)aintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;" 38/

3. "(P)ublish in the Federal Register at least annually a notice of the existence and character of the system of records...;" 39/

4. Maintain such records "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;" 40/

5. Make reasonable efforts to assure the accuracy, completeness and timeliness of records about individuals prior to their dissemination; 41/

6. "Maintain no record describing how an individual exercises rights guaranteed by the First Amendment unless expressly authorized by Statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity; 42/

7. Refrain from disclosing "any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains...." 43/

38/ 5 U.S.C. § 552a(e)(1).

39/ 5 U.S.C. § 552a(e)(4).

40/ 5 U.S.C. § 552a(e)(5).

41/ 5 U.S.C. § 552a(e)(6).

42/ 5 U.S.C. § 552a(e)(7).

43/ 5 U.S.C. § 552a(b).

Except disclosure may be made without the consent of the individual

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) pursuant to the order of a court of competent jurisdiction.

44/ Id.

The so-called "law enforcement" exception to the disclosure limitations of the Privacy Act, set out above, permits agency disclosure of personally-identifiable information for lawful domestic law-enforcement purposes upon the written request of the head of the law enforcement agency. The Office of Management and Budget Guidelines 45/ stress that disclosure may be made only if the written request specifies

> ...(t)he law enforcement purpose for which the record is requested; and the particular record requested. 46/

Blanket requests for all records pertaining to a particular individual should not be honored pursuant to subsection B-7. In addition, the OMB Guidelines make clear that disclosure to a law enforcement agency as a "routine use" is permissible when the agency maintaining the record suspects a violation of law and when such disclosure has been established in advance as a "routine use." 47/ The Guidelines quote a statement by Congressman Moorhead in debate of the Privacy Act in this regard:

> It should be noted that the "routine use" exception is in addition to the exception provided for dissemination for law enforcement activity under subsection (b)(7) of the bill. Thus a requested record may be disseminated under either the "routine use" exception, the "law enforcement" exception, or both sections, depending on the circumstances of the case. (Congressional Record November 21, 1974, p. H10962.) 48/

45/ Office of Management and Budget, Privacy Act Implementation, Guidelines and Responsibilities, 40 Fed. Reg. 28,948 (1975).

46/ Id. at 28,955.

47/ Id.

48/ Id.

It is interesting to note that the Guidelines specifically mention, as an example of disclosure of records in law enforcement systems as a "routine use",

> ...transfer by a law enforcement agency of protective intelligence information to the Secret Service. 49/

The Privacy Act also contains provisions for the general exemption of certain records from some provisions of the act. The so-called general exemption provision authorizes exemption of a system of records if the system is:

> (1) maintained by the Central Intelligence Agency; or
>
> (2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision. 50/

49/ Id.

50/ 5 U.S.C. § 552a(j).

This section permits agency heads to exempt systems of records which are maintained by the Central Intelligence Agency or for criminal law enforcement purposes. The provision permits exemption of records meeting the requirements of (1) or (2) above from all provisions of the Privacy Act except:

(1) conditions of disclosure; 51/

(2) accounting of disclosures and retention of the accounting; 52/

(3) publication in the Federal Register of notice of the existence and character of systems of records; 53/

(4) the requirements of accuracy, completeness and timeliness prior to dissemination of records; 54/

(5) the prohibitions on maintaining records pertaining to an individual's exercise of First Amendment rights; 55/

(6) the requirement for establishment of rules of conduct; 56/

(7) the establishment of safeguards to ensure the security and confidentiality of records; 57/

(8) publication of "routine use" notices in the Federal Register; 58/

51/ 5 U.S.C. § 552a(b).

52/ 5 U.S.C. § 552a(c)(1),(2).

53/ 5 U.S.C. § 552a(e)(4)(A)-(F).

54/ 5 U.S.C. § 552a(e)(6).

55/ 5 U.S.C. § 552a(e)(7).

56/ 5 U.S.C. § 552a(e)(9).

57/ 5 U.S.C. § 552a(e)(10).

58/ 5 U.S.C. § 552a(e)(11).

(9) criminal penalties imposed for violation of the act. 59/

When the head of an agency decides that a system of records maintained by the agency should be exempted from provisions of the Privacy Act pursuant to §552a(j) above, the agency must publish a notice in the Federal Register. This notice must state as a minimum the name of the system and the specific provisions of the act from which the system is to be exempted and the reasons for the exemption. 60/ The OMB Guidelines stress that:

> ...the exemption provisions are permissive, i.e., an agency head is authorized, but not required, to exempt a system from all or any portion of selected provisions of the act when he or she deems it to be in the best interest of the government and consistent with the act and these guidelines... 61/

The Guidelines then quote the House Report as follows:

> The committee also wishes to stress that this section is not intended to require the C.I.A. and criminal justice agencies to withhold all their personal records from the individuals to whom they pertain. We urge those agencies to keep open whatever files are presently open and to make available in the future whatever files can be made available without clearly infringing on the ability of the agencies to fulfill their missions. (House Report 93-1416, p. 19). 62/

The "specific exemption" section of the Privacy Act 63/ authorizes the exemption of certain specific categories of systems of records from certain provisions of the act. A system is exempt under this provision if it is:

59/ 5 U.S.C. § 552a(i).

60/ Supra note 40 at 28,971.

61/ Id.

62/ Id.

63/ 5 U.S.C. § 552a(k).

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

64/ Id.

Pursuant to the "specific exemption" section, §(k), agency heads may exempt systems of records from a limited number of the Privacy Act's provisions. However, systems may not be exempted under this section from any of the provisions to which systems under the "general exemption" section, §(j), may not be exempted and, in addition, may not be exempt from:

(1) informing prior recipients of corrected or disputed records; 65/

(2) collection information, where possible, directly from the concerned individual; 66/

(3) informing individuals of the authority pursuant to which information is sought and whether providing the information is mandatory or voluntary; 67/

(4) maintaining accurate, timely and relevant records; 68/

(5) notifying individuals when records pertaining to them are disclosed under compulsory process; 69/

(6) civil remedies. 70/

Subsection (k)(2), set out above, allows agency heads to exempt a system of records which is compiled in the course of an investigation of an alleged or suspected violation

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65/ 5 U.S.C. § 552a(c)(4).

66/ 5 U.S.C. § 552a(e)(2).

67/ 5 U.S.C. § 552a(e)(3).

68/ 5 U.S.C. § 552a(e)(5).

69/ 5 U.S.C. § 552a(e)(8).

70/ 5 U.S.C. § 552a(g).

> of civil laws, including violations of the Uniform Code of Military Justice and associated regulations, except to the extent that the system is more broadly exempt under the provision governing records maintained by an agency whose principal function pertains to the enforcement of criminal laws.... 71/

Thus, this subsection allows exemption of investigatory files of agencies which are not principally law-enforcement agencies.

The House Report on the Privacy Act of 1974 72/ states the following as the purpose of subsection (k)(2):

> Individual access to certain law enforcement files could impair investigations, particularly those which involve complex and continuing patterns of behavior. It could alert subjects of investigation that their activities are being scrutinized, and thus allow them time to take measures to prevent detection of illegal action or escape prosecution. 73/

And subsection (k)(3) allows an agency to promulgate rules to exempt any system of records maintained in connection with providing protective services pursuant to 18 U.S.C. § 3056. Thus, records maintained by the Secret Service in connection with the responsibility for protection of the President can be exempted from most provisions of the Privacy Act. It should be noted that the House Report specifically stated that:

> (a)ccess to Secret Service intelligence files on certain individuals would vitiate a critical part of Secret Service work which was specifically recommended by the Warren Commission that investigated the assassination of President Kennedy and funded by Congress. 74/

71/ Supra note 40 at 28,972.

72/ H.R. Rep. No. 93-1416, 93d Cong. 2d Sess. (1974).

73/ Id. at 19.

74/ Id.

Pursuant to 5 U.S.C. § 552a(j) and (k), the United States Secret Service has promulgated rules and regulations which exempt certain systems of records from the Privacy Act provisions. 75/ These regulations exempt the Secret Service Criminal Investigation Information System of Records, the Non-Criminal Investigation Information System of records, and the Protection Information System of records. The stated purpose of the exemption is to "maintain the confidentiality of information compiled for the purpose of criminal, non-criminal, and protective investigations." The systems described above are exempted by these regulations from the Privacy Act provisions which require access by the subject individual to records, accounting for disclosure of records pertaining to said individual, notice to individuals when disclosure is made, individual access to records, limitations on the kinds of information maintained about individuals, collecting information, where possible, directly from the subject individual, notifications to individuals from whom information is sought, publication of procedures for individual access to records and of sources of information in the system, accuracy, relevance, timeliness, and completeness of records, notification of disclosure to subject individuals, promulgation of agency rules for access and disclosure, and civil remedies for agency failures to comply with the disclosure/amendment provisions of the act.

75/ 31 C.F.R. § 1.36.

The Freedom of Information Act - Law Enforcement Files

Though titled "Public Information" and intended for the purpose of making information available to the public, section 3 of the Administrative Procedure Act of 1946 76/ was largely used by Federal agencies as authority for withholding rather than disclosing information. 77/ Less than ten years following enactment of this provision, proposals were suggested for its revision. Bills were introduced in the 84th, 85th, 86th, 87th, and 88th Congresses. Both chambers held extensive hearings on these various proposals. Finally, in the 89th Congress, both houses agreed on a bill which was enacted as the original Freedom of Information Act. 78/ The original Freedom of Information Act 79/ remained essentially unchanged until the amendments of 1974.

Beginning as early as 1972, however, a movement for change began growing. In September of 1972, the House Government Operations Subcommittee on Foreign Operations and Government Information concluded that the Freedom of Information Act has been "hindered by five years of

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76/ 5 U.S.C. § 1002 (1952).

77/ H.R. Rept. No. 1497, 89th Congress., 2d Sess. 4 (1966).

78/ S. 1160 was passed by the Senate on October 13, 1965 and by the House on June 20, 1966. It was enacted into law as Public Law No. 89-487 on July 4, 1966.

79/ Codified as 5 U.S.C. § 552 by Pub. Law No. 90-23, 90th Cong., 1st Sess. (1967).

footdragging" by the Federal agencies. 80/ After the subcommittee recommended legislative remedies, it held further hearings in May, 1973 and introduced H.R. 12471 to amend the Freedom of Information Act in early 1974. 81/ The Senate Considered and passed similar legislation. 82/ In October, 1974, the Senate and House agreed on a conference bill, but on November 18, 1974, President Ford vetoed H.R. 12471. President Ford stated in part:

> Second, I believe that confidentiality would not be maintained, if many millions of pages of FBI and other investigatory law enforcement files would be subject to compulsory disclosure at the behest of any person unless the Government could prove to a court -- separately for each paragraph of each document -- that disclosure "would" cause a type of harm specified in the amendment. Our law enforcement agencies do not have, and could not obtain, the large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination of information requests that sometimes involve hundreds of thousands of documents, within the time constraints added to current law by this bill.
>
> Therefore, I propose that more flexible criteria govern the responses to requests for particularly lengthy investigatory records to mitigate the burden which these amendments would otherwise impose, in order not to dilute the primary responsiblities of those law enforcement activities. 83/

Despite the Presidential veto and President Ford's message stating his reasons for the veto, both Houses of Congress voted to override the veto and

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80/ H.R. Rept. No. 1419, 92d Cong., 2d Sess. 8 (1972).

81/ The House passed H.R. 12471 on March 14, 1974 by a vote of 383-8.

82/ The Senate passed S. 2543 on May 30, 1974 by a vote of 64-17.

83/ Gerald R. Ford, Message Accompanying Veto of H.R. 12471 (November 18, 1974.)

enact H.R. 12471 into law. The House vote was held on November 20, 1974 and was 371-31. The Senate voted on November 21, 1974, 65-27. H.R. 12471 became Public Law No. 93-502 on November 21, 1974 and became effective on February 19, 1975.

The Freedom of Information Act 84/ is a mandatory disclosure statute granting access to the public to final opinions and orders of Federal agencies, agency policy statements and interpretations not published in the Federal Register, and other government records including administrative staff manuals and instructions to staff which affect a member of the public. Agencies must:

1. Publish in the Federal Register organizational descriptions and procedure for obtaining information; statements concerning its procedures for decision-making; rules of procedure; substantive rules of general applicability; amendments, revision or repeal of the above. 85/

2. Make available to the public for inspection and copying agency final opinions; statements of agency policy and interpretations not published in the Federal Register; administrative staff manuals and instructions to staff that affect a member of the public; current indexes to information required to be made available to the public or published in the Federal Register. Identifying details may be deleted to prevent a "clearly unwarranted invasion of personal privacy." 86/

84/ 5 U.S.C. § 552.

85/ 5 U.S.C. § 552(a)(1).

86/ 5 U.S.C. § 552(a)(2).

3. Promulgate regulations setting forth a schedule of fees for searches and/or duplication of information. 87/

4. For agencies having more than one member -- maintain and make available for public inspection a record of the final votes of each member in every agency proceeding. 88/

However, the Freedom of Information Act does not apply to records that are:

> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

87/ 5 U.S.C. § 552(a)(4).

88/ 5 U.S.C. § 552(a)(5).

89/ 5 U.S.C. § 552(b).

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Exemption 7 provides a limited immunity from disclosure for law enforcement investigatory records. This exemption was narrowed by the 1974 FOIA amendments and was one of the reasons set forth by President Ford for his veto of the amendments. 90/ To be exempt from disclosure under exemption 7 records must be both "investigatory" and "compiled for law enforcement purposes." In addition, disclosure of these records is not required only to the extent that production of the records would:

(A) Interfere with enforcement proceedings;
(B) Deprive a person of a fair trial or an impartial adjudication;
(C) Constitute an unwarranted invasion of personal privacy;
(D) Disclose the identify of a confidential source or, for law enforcement agencies, confidential information furnished solely by a confidential source;
(E) Disclose investigative techniques and procedures;
(F) Endanger the life or physical safety of law enforcement personnel.

It is important to note that prior to the 1974 amendments the Act permitted withholding "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." The present exemption for law enforcement records, as amended in 1974, essentially overrules the substantive provision of the original exemption to the extent that an agency can no longer claim the exemption just by showing that information is in an investigatory file. Rather, the agency must now demonstrate that the disclosure of the particular "record" requested will harm the government in one or more of the six areas listed

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90/ See text accompanying note 83 supra.

in the exemption. If disclosure of any segment of the "record" will not result in such harm, that part must be segregated and released to the requester.

Apparently, Exemption 7 as amended has caused difficulty for law enforcement agencies facing requests for disclosure of agency records. Certainly the additional administrative burden is not to be ignored. Law enforcement agencies must examine requested records to determine whether they are "investigatory" and "complied for law enforcement purposes." Only if these two criteria are met are the records possibly exempt. However, it must also be determined that disclosure of the records will harm one of the six protected interests enumerated in the statute. To once again quote from the statement made by Director Shea,

> That second kind of adverse impact has been one of administrative burden and largely unfunded costs...the dollar costs to the Department of Justice in FY 1977 was, at a minimum, between thirteen and fourteen million dollars. For the Federal Bureau of Investigation alone, the figure for the year was in excess of ten million, six hundred thousand dollars. My own judgment is that the correct total, if we could recover all of our cost data, would be in excess of fourteen million dollars. 91/

In addition to this increased administrative burden, the Department of Justice has found that Exemption 7 is not sufficiently broad or specific to protect all of the sensitive records which it maintains. Although the identities of confidential sources and secret investigative techniques and procedures are protected from disclosure by Exemption 7, two types

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91/ Supra note 4 at 43.

of information most commonly cited by law enforcement personnel as needing protection, the Exemption does not specifically include in its coverage law enforcement agents manuals and other sensitive administrative materials compiled by law enforcement agencies. In addition, it is not clear that the identities of law enforcement personnel can be withheld as an unwarranted invasion of privacy under exemption 7(C).

Unlike the Privacy Act, the Freedom of Information Act does not specifically refer to records maintained by the Secret Service in connection with its responsibility to protect the President. However, the Department of Justice has taken the position that "law enforcement" as used in the FOIA "includes not merely the detection and punishment of law violation, but also its prevention." 92/ Therefore, records maintained by the Secret Service in connection with protecting the President would appear to be included in the "law enforcement" records exemption. However, the FOIA does not have a provision, similar to that previously discussed contained in the Privacy Act, which would allow the Secret Service to exempt entire files of records from mandatory disclosure under the FOIA. Each record would have to be reviewed separately and a determination made as to disclosure.

In conclusion, it seems that the provisions of the Freedom of Information Act would require more disclosure of law enforcement records than the provisions of the Privacy Act. Although identities of

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92/ See A.G.'s 1974 FOI Amendments. Mem.

Effect of Privacy/FOI Acts on Commission Recommendations
The Warren Commission

The Privacy Act would not prevent transfer of information pertaining to Presidential security from the F.B.I. or other Federal or State or local agencies to the Secret Service. Such a transfer of information could be accomplished by designating it as a "routine use" and publishing the "routine use" in the Federal Register. 93/ Or, the Secret Service could obtain specific records from other Federal agencies by requesting them in writing from the head of the agency pursuant to the "law enforcement records" exception. 94/ In addition, such a transfer could be accomplished if the desired information is contained in a system of records which has been exempted from the Privacy Act provisions by the agency maintaining the information. 95/ The Privacy Protection Study Commission indicated in its Final Report to Congress 96/ that Criminal Law Enforcement agencies have exempted 210 systems of records from the provisions of the Privacy Act and that 545 other systems have been exempted by other agencies because they contain law enforcement records. In addition, 72 Protective Services Records Systems have been exempted. 97/

93/ 5 U.S.C. § 552a(b)(3).

94/ 5 U.S.C. § 552a(b)(7).

95/ 5 U.S.C. § 552a(j)(2), (k)(2).

96/ The Privacy Protection Study Commission, Personal Privacy in an Information Society (1977).

97/ The Privacy Protection Study Commission, Appendix 4 to the Report of the Privacy Protection Study Commission (July, 1977).

confidential sources are protected as are secret investigative techniques and procedures, other sensitive information might be required to be disclosed under the FOIA either because the exemption for law enforcement records is too narrow or because the criteria for withholding information contained therein are not sufficiently specific. However, it should be noted that Congress was aware of the required balancing process between the needs of law enforcement and the demands of privacy when it debated and passed the amendments to the FOIA. Therefore the FOIA as amended should be viewed as Congress' attempt, however imperfect, to arrive at an acceptable balance between these two interests.

The Freedom of Information Act has no provisions limiting disclosure of records by one Federal agency to another.

Neither the Freedom of Information nor the Privacy Act would prohibit the Secret Service from automating its investigatory data files as recommended by the Warren Commission.

The Katzenbach Commission

The Katzenbach Commission recommended that a national law enforcement directory be established which would record "an individual's arrests for serious crimes" including the disposition and other contacts with the criminal justice system related to those arrests. Access to this directory would be limited to criminal justice agencies. In addition, the Commission recommended that State law enforcement agencies establish similar directories, plus directories containing additional information on the individuals such as education records, employment records and probation reports. The directories containing arrest information would be limited to access by criminal justice agencies and the supplementary information would be limited to access by courts or corrections officers. 98/

Neither the Privacy Act nor the Freedom of Information Act would apply to the activities of State agencies in establishing criminal justice data files. In addition, neither act would prevent the establishment of such directories by Federal criminal justice agencies. The Privacy Act

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98/ See text accompanying note 17 supra.

would require that notification be published in the Federal Register if such new systems of records are established. 99/ Presumably the directories would be maintained by Federal criminal justice agencies and thus could be exempted from most provisions of the Privacy Act pursuant to exemption (j). 100/ Also, disclosure of the information in the directories to other law enforcement agencies could be made as a "routine use" or pursuant to the B-7 exception. 101/ Although the Freedom of Information Act would not effect establishment of the directories, it might require disclosure of the information contained in the directories if it did not fall within the parameters of the FOIA law enforcement records exemption. 102/

The Katzenbach Commission also recommended that a National Criminal Justice Statistics Center be established in the Department of Justice. 103/ This Center would compile statistical data on anonymous criminal offenders and on the system response to crime. The Privacy Act would not apply to such non-personally-identifiable records. The Freedom of Information Act, however, would probably require disclosure of such information on request. However, disclosure to interested persons and groups would seem to be one of the purposes of compiling such information.

99/ 5 U.S.C. § 552a(e)(4).

100/ 5 U.S.C. § 552a(j)(2); and see text accompanying note 50 supra.

101/ 5 U.S.C § 552a(b)(3), (b)(7).

102/ 5 U.S.C. § 552(b)(7).

103/ See text accompanying note 18 supra.

Neither Act would prevent law enforcement agencies from improving their collection and transmission of information, as recommended by the Katzenbach Commission. 104/ And data on criminal offenders could be maintained by Federal law enforcement agencies and disclosed to prosecutors, courts, and correctional authorities and the system in which the data is contained may be exempted pursuant to the general law enforcement exemption of the Privacy Act. 105/ The information would have to meet the requirements of the FOIA law enforcement records exemption in order to prevent disclosure pursuant to the Freedom of Information Act. 106/

Neither Privacy nor FOIA would prevent Federal law enforcement agencies from developing an index drawn from State and local criminal, justice agencies. And, it would seem that a computerized, central organized crime intelligence system could be maintained by the Department of Justice consistent with the Privacy Act and be exempted pursuant to the general law enforcement exemption of the Privacy Act. 107/ Once again, individual records contained in these systems would have to be examined to determine disclosure requirements under the Freedom of Information Act. 108/

Therefore, it would appear that all of the recommendations of the Katzenbach Commission could be implemented without violating either the

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104/ See text accompanying note 20 supra.

105/ 5 U.S.C. § 552a(j)(2)(C).

106/ 5 U.S.C. § 552a(b)(7).

107/ 5 U.S.C. § 552a(j).

108/ Supra note 106.

Privacy or the Freedom of Information Act. Disclosure requirements, especially under the Freedom of Information Act, would have to be determined by an analysis of individual records.

The Kerner Commission

The Kerner Commission recommended that police departments develop intelligence units to gather, evaluate, analyze, and disseminate information on potential as well as actual civil disorders. 109/ It seems that this is the only recommendation made by the Kerner Commission relating to information gathering or maintenance. Since neither the Privacy Act nor the Freedom of Information Act apply to other than Federal agencies, these statutes would have no effect on activities of State and local police departments in collecting or maintaining information on civil disorders.

The Eisenhower Commission

The Eisenhower Commission recommended that Federal law enforcement agencies devise methods and procedures for identifying "violence-prone individuals." Such methods and procedures, i.e., catalogues of common traits, characteristics, etc. manifested by such individuals can be devised and in fact are utilized by Federal law enforcement agencies. Records pertaining to such methods and procedures, however, might be subject to disclosure

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109/ See text accompanying note 26 supra.

pursuant to the Freedom of Information Act if they would not meet the requirements of the Act's law enforcement records exemption. 110/

Finally, the Eisenhower Commission recommended that a Federal firearms center be established to "accumulate and store information on firearms and owners received from state agencies." This information would be available to both State and Federal law enforcement agencies. 111/ Politically, the establishment of such a center would be difficult. However, neither the Privacy Act nor FOIA would prevent its establishment. However, such information might be subject to disclosure under FOIA if it would not be deemed "a clearly unwarranted invasion of privacy" 112/ or to the particular individual to whom the record pertains pursuant to the Privacy Act. 113/ Again, however, it would not appear that such disclosure would prevent accomplishment of the goals which establishment of the center would seem to be designed to attain.

Kathleen Perkins
Legislative Attorney
American Law Division
June 22, 1978

110/ Supra note 106.

111/ See text accompanying note 32 supra.

112/ 5 U.S.C. § 552(b)(6).

113/ 5 U.S.C. § 552a(d).

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THE LIBRARY OF CONGRESS

Congressional Research Service

WASHINGTON, D.C. 20540

June 23, 1978

Mr. G. Robert Blakey
Select Committee on Assassinations
U.S. House of Representatives
HOB Annex 2
Washington, D.C. 20515

00348

Dear Bob:

Enclosed is my final report responding to your request to the American Law Division of the Library of Congress. The thread which ties the considerations of this report together, of course, is the role of legislative alternatives in the interpretation of the Constitution.

I would like to note at this point the temporary nature of any report of this kind. In the six weeks since the text was completed, several events have already begun to alter its meaning. First, I would like to call to your attention the recent Supreme Court case of United States v. LaSalle National Bank, --U.S.-- 46 U.S.W.W. 4713 (No. 77-365, June 19, 1978). LaSalle now provides for an "institutional good faith" test to be applied to enforcement of IRS administrative summonses when there is any question of use of the summons to acquire evidence for criminal investigations. This contrasts with the text of the report (Chapter III, Section E, pages 88-90) noting any valid use of the summons would permit enforcement even if criminal prosecution was being contemplated: a potential alternative test. Secondly, the Subcommittee on Government Information and Individual Rights of the House Government Operations Committee held hearings on H.R. 10076 (Chapter III, Section J. pages 131-134) on May 23 and 24. You may recall this bill to embody the recommendations of the Privacy Protection Study Commission. Thirdly, the Pennsylvania Supreme Court reaffirmed its judgment in Philadelphia Newspapers v. Jerome, 46 U.S.L.W. 2575 (April 28, 1978), finding that United States v. Cianfrani was not contrary. These cases, and Gannett Co. v. De Pasquale, in which the Supreme Court has granted certiorari, ask whether it is constitutional to exclude the public and the press from pretrial hearings in order to avoid publicity which would prejudice the defendant's right to an impartial jury.

Chapter II, Section F, note 111 and accompanying text. I would not be surprised if this letter becomes obsolete before it reaches you.

If I can be of any further assistance, please feel free to call on me.

Sincerely,

Leland E. Beck
Consultant
American Law Division

Enclosure

Approved For Release 2005/03/24 : CIA-RDP81M00980R000200020044-0

TABLE OF CONTENT

I. INTRODUCTION

The assassination of President John F. Kennedy remains one of the most traumatic experiences in recent history. The subsequent slaying of Lee Harve Oswald foreclosed the legal determination of his guilt for this crime, and, in al liklihood, altered the future development of the law. Because the legal process was aborted, speculation as to the facts of the case has led to the establishment of the House Select committee on Assassinations; continuing speculation as to the controlling law, and the potential effects on our contemporary ability to understand the case, have led the Committee to request this study.

Had Lee Harvey Oswald survived and gone to trial a number of legal questions would necessarily arise -- perhaps most prominent among them: Oswald's right to a fair trial before an impartial jury, the identification of Oswald with the murder weapon, and the admissability or suppression of particular evidence. Speculation on these bare questions in the context of a 1963 Texas murder trial would be a futile exercise unless posed in the larger context of the development of the law. The policy considerations which lead us not to attempt to try a dead man inevitably lead to the same conclusion in terms of analyzing the law; accuracy, fairness and justice are not guaranteed, they are subserved and the results would be meaningless. Indeed, the development of the law -- as well as the suconscious standards which lawyers apply -- has been significant in the intervening fifteen years. Thus even a speculation of the meaning of transplanting the facts from a 1963 Texas murder trial to a 1978 Federal Presidential assassination case would provide limiteduseful insight. This study seeks to do neither of these things.

At the same time, the Committee's jurisdiction must be considered in order for this study to be responsive to its needs. This jurisdictional issue narrows the scope of potential issues to those claims of Federal rights which might have existed in either time-frame. Much as the Warren Commission recommended that the congress assert criminal jurisdiction over the assassination of the President, the Select Committee must specifically consider its legislative alternatives. In doing so, the controlling consideration would not be the state of the law in 1963, but the state of the law in 1978; thus significant issues must be discussed which could have been raised. The main focus of this study is on the recurring themes in the law which remain unresolved. Three major areas of concern proide fertile ground for legislative action today.

The trilogy of concerns for a free press, a fair trial and a speedy trial have become ever more apparent since the Kennedy assassination. Critical analysis of whether Oswald could have been afforded a fair trial within a reasonable period fo time without infringing on the press is a legal question which has been asked in other contexts and cases many times. such a critical analysis, with all the benefit of hindsight, indicates that Oswald could have received a fair trial by even contemporary standards, but, because of the unique factual situation and the external pressures evident, probably would not have. This is not to say that an initial trial would have been reversed if a conviction were obtained, it is only to say that such a conviction probably would not stand in any other case. The issue of conflicting constitutional rights has recurred many times since 1963 and a variety of options are available for congress to consider in making a constitutional interpretation.

A second issue arises over the identification of Oswald with the murder weapon. Much of the evidence to be presented at the trial would have necessarily attempted this linkage through the use of records obtained from third parties. In 1963 there would appear to have been little concern over the use of third party records, but since that time the issue has come clearly to the fore. While this problem can only be raised extrajurisdictionally, contemporary saliency in the privacy/investigative efficiency debate demands this attention. In short, the issue has developed almost entirely in the past fifteen years, but today demands commentary from recurrence.

Thirdly, the question of admissability or exclusion of evidence raises questions of both Texas and Federal law; yet only Federal law will be analyzed in the context of jurisdictional limitations. Concern here is limited to those exclusions which would have based on the Constitution or would have derived from it. Unlike the first two issues -- both concerning controls and remedies -- the issue of exclusion focuses on the remedy as the problem; the Exclusionary Rule and its corrollaries. In the Oswald case the demands for exclusion of evidence on Constitutional, statutory or supervisory grounds would necessarily have been weighted in the balance with the political reactions which would have attended their exclusion. Traditionally, exclusion of evidence is wholly within the province of the court, but the alternatives or utility of this remedy for misconduct has been determined by all branches of the Federl government. Thus, this chapter deals more extensively with the alternatives to exclusion which Congress might then with the substance of the remedy's.

In each case - free press/fair trial, third party records and evidentiary exclusion -- we are dealing with the continuing rebalancing of

Constitutional priorities. The relative weights to be given to individualized privacy and law enforcement efficiency have been rebalanced by each succeeding stage of history depending on social and political needs. In recent years this change has been most apparent in the changing doctrinal thought of the Supreme Court. And in each case, it is necessary to review these issues from the viewpoint of institutional decision-making, as well as from that of the disinterested researcher. Ultimately none of these questions can be considered or reconsidered as merely legislation, judicial interpretation or executive practice; each represents the process of the Constitutional being construed.

Accordingly, the chapters which follow are premised factually on the Oswald trial which never was and evelop the law as it exists today. Ultimately the purpose of this study is to provide a basis for Congress to consider its Constitutional mandate of legislation. In that light, it analyzes contemporary alternatives and legislative proposals but does not make specific legislative recommendations.

II. THE FREE PRESS, FAIR TRIAL AND SPEEDY TRIAL TRILEMMA

The concepts of a free press and a fair trial are firmly engrained in the American heritage and are more often complementary than contradictory. Occasionally, when a particular criminal act is especially shocking to the public conscience, news coverage of the investigation, arrest of a suspect and pretrial procedures impinges on the defendant's right to a fair trial by exposing potential jurors to prejudicial, but ultimately inadmissable, information. Traditionally the courts have sequestered juries to minimize potential prejudice during the trial, changed the venue of trial to a place which has not been affected by pretrial publicity, or delayed trial until the effect of the publicity has subsided. The last of these traditional remedies also raises the potential problem of a defendant's right to a speedy trial.

The trial of Lee Harvey Oswald, had it occurred, would have brought these values of our legal system into a distinctly contradictory trilemma. This section of the report will review the bases for the trilemma in the Oswald case, the prospects for recurrence of the trilemma, the free press and fair trial historical backgrounds, the law which would have controlled the Oswald case, the development of that law since 1963 and the interposition of speedy trial considerations and law.

A. The Facts in the Oswald Case

The fact that Lee Harvey Oswald was a possible suspect in the assassination of President Kennedy was first reported on television less than three hours after the assassination and only one and one-half hours after Oswald's arrest.[1/] During the course of the next two days, Oswald traversed the twenty feet between the homicide division offices and the elevator to the jail, through a crowd of reporters and still, film and video-television cameras, at least fifteen times. When Oswald appeared, he was the center of the media's attention and he sometimes answered their questions. After demands were made by the press, the District Attorney and the Chief of Police presented Oswald in a lineup room at about midnight on the 22nd. Despite instructions not to ask questions of Oswald at this press conference, Oswald was asked whether he killed President Kennedy and he responded that the first he had heard of it was from the newspaper reporters in the third floor corridor of police headquarters. At this time Oswald had not been arraigned for the Kennedy assassination. The District Attorney and the Chief of Police were attempting to be cooperative with the press at this time and had allowed the media access to the third floor corridor and had arranged the press conference. Newspaper reports at the time indicate that much of the evidence developed against Oswald was given to the media as soon as it was available, whether verified or untested. Later developments proved

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1/ Warren Commission Report (hereinafter cited as "WCR") 48, 201. President Kennedy was shot at 12:30; Oswald was arrested for slaying Patrolman Tippit at 1:55; and the first television report that Oswald was suspected of the Kennedy assassination was broadcast at 3:26.

significant inaccuracies in the release and reporting of this information. On at least a dozen different occasions the Chief of Police held informal press conferences in the police headquarters and disclosed information which was either inaccurate or premature, including the letter ordering the rifle, handwriting exemplars, photographs and FBI ballistics tests. Many of these discussions were televised live by the national networks. 2/ The final element of publicity was the live televised coverage of the aborted transfer in which Oswald was shot by Jack Ruby. 3/

Much of the publicity in this case was live television coverage supplemented by one to three hundred newspaper reporters representing local and national papers, the wire services and the foreign press. All three commercial television networks carried the midnight press conference and the abortive transfer live, and supplemented press interviews with news analysis by feature reporters and anchormen.

2/ Id. at 231 - 243.

3/ Id. at 200 - 208.

B. Potential for Recurrence

No other single event has received the attention of the news media in the way the assassination of President Kennedy was covered. Nonetheless, individual criminal cases have received such local, and occasionally national, attention as to make the questions of a free press and fair trial inescapable for any investigator of the Kennedy assassintion

A catalogue of violent crimes and unseemly cases which attract the attention of the press to this extent would necessarily include the murder of Sharon Tate and the Manson family trial; the slaying of Jack Yablonski and his family and the trial of UMW rival Tony Boyle; the My Lai incident and the trial of William Calley: the Chicago Seven Trial; the Watergate cases; the takeover of buildings in the nation's capital by the Hanafi Muslims; the Davis case; and the trials of major organized crime and rackeeterring figures; state governors; state Supreme Court justices; mayors of major cities and other high officials in the state and federal governments. In any case of major proportion the potential for conflict between the rights of a free press and of a defendant to a fair trial is present. While a number of factors may shape the disposition of the press to cover a particular trial or the investigation in a particular case, the reporting of the facts as they are discovered or as evidence to a jury is in a delicate balance.

C. Freedom of the Press

The concept of freedom of the press has taken many forms and has been opposed in as many ways. The first major American step toward a free press was in the political nature and the jury's refusal to convict in the trial of John Peter Zenger in 1735.[4/] Introduction the freedom of the press into the Constitution was largely a response to the English tradition of licensing printers and controlling the content of their publications. The final language, that "Congress shall make no law . . . abridging the freedom of speech, or of the press; ...", was a compromise struck in conference between the House and Senate in 1789.[5/] The main elements of the law which has developed under the pertinent clause of the First Amendment that are relevant here are prior restraint and contempt by publication.

The seminal case on prior restraint is Near v. Minnesota.[6/] In accordance with a Minnesota law a county attorney had filed suit to declare a newspaper published by Near a nuisance because of its inflammatory and potentially libelous contents. A local court agreed and enjoined further publication. The Supreme Court noted at length that the ability to enjoin publication of a particular matter and permit a newspaper or other periodical to recommence publication only without the offending matter under pain of contempt was tantamount to censorship. The Court held that such a prior restraint on publi-

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4/ L. Levy. Freedom of the Press: from Zenger to Jeffers (1966).

5/ Constitution of the United States, Amendment I (1789).

6/ 283 U.S. 697 (1931).

these guarantees are relatively limited in light of the more pervasive controls on the press - including the limitations on civil and group libel,[9/] criminal sanctions for publication of classified information[10/] and limitations on access to information[11/] -- the interplay with the right to a fair trial is relatively circumscribed by these two areas.

9/ Beauharnais v. Illinois, 343 U.S. 250 (1952).

10/ New York Times Co. v. United States, 403 U.S. 713 (1971).

11/ Pell v. Procunier, 417 U.S. 817, (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

D. Trial by an Impartial Jury

The history of a jury trial has been marked by an ever increasing sense of fairness. The jury has developed from a board of investigators who familiarized themselves with the facts of a case through contact with the parties and the public, to a board of decisions-makers which is insulated from the parties and the public except under the discipline of a court trial. The concept of an impartial jury is founded in the Sixth Amendment, which is applicable to the States as well as the Federal Government, and the equal protection and due process clauses of the Fourteenth Amendment.12/

The first element of an impartial jury is that it represent a cross-section of the community in which the crime was committed and the trial held.13/ This concept has lead in recent years to the challenges to jury composition based on race, sex, employment, selection technique and other criteria. The first element is founded on the concept of equal protection of the laws. The second element is that the jury members not be biased against the defendant and be willing to reach a verdict on the basis of the evidence presented at the trial and the law as instructed by the judge. This second element opens

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12/ The Sixth Amendment contains the language "impartial jury" and this is construed under the Fourteenth Amendment's equal protection clause to prohibit exclusion from juries on the basis of race, Strauder v. West Virginia 100 U.S. 303 (1880), or ancestry, Hernandez v. Texas, 347 U.S. 475 (1954). The due process clause has been used to make exclusion of less defined classes prohibited.

13/ Brown v. Allen, 344 U.S. 443 (1953); Williams v. Florida, 399 U.S. 78 (1970).

the door to a wide variety of often subtle influences such as a prejudiced bailiff or being placed in the care of sheriff's deputies who are prosecuting witnesses,[14/] to the threat of mob violence and actual jury tampering.

The present analysis is limited to the influence exerted by the normal operation of the institution of a free press. In this area, a particular juror may become biased by a news article or story either before or during trial and this may render that juror incapable of reaching a verdict solely on the basis of the evidence presented at trial. Perhaps the most common improper influence is the publication of details of a pretrial hearing on a motion to suppress evidence which has been unlawfully acquired; the publication in itself may defeat the purpose of suppression.

14/ Parker v. Gladden, 385 U.S. 363 (1966); Turner v. Louisiana, 379 U.S. 485 (1965).

E. The Free Press -- Fair Trial Dilemma

The principal question in the present analysis is when does pretrial publicity become so pervasive that it is impossible to secure a fair and unbiased jury. The question itself involves a wide variety of subordinate questions -- especially as to the remedy. The state of this question in late 1963 differs significantly from contemporary standards and the question of whether Lee Harvey Oswald could receive a fair trial at that time or today may present very different answers. The Kennedy assassination in 1963 presents a significant landmark in the development of the free press -- fair trial dilemma for the questions it does not answer.

It should be noted that in 1963 great emphasis was placed on the form of a jury -- that it be composed by twelve men, not more of less; that it be supervised by a competent judge instructing as to the law and advising as to the facts; that the jury trial be a privilege of the accused and not a jurisdictional requirement, and could be waived by the accused with the approval of the government and the judged; and that its verdict must be unanimous.[15/] Since 1963 a number of these formalities have been changed and some have been reaffirmed. The more analytic question of pretrial publicity and bias has become much more sophisticated.

15/ Andres v. United States, 333 U.S. 740 (1948); Rassmussen v. United States, 197 U.S. 518 (1905).

While the conflict of principles is of a Constitutional dimension, it lay dormant for many years. Only the bare rudiments of the concepts were sketched because the real conflict did not occur until the technology of mass communication reached a sophistication that allowed a wide number of people to have instantaneous knowledge of an occurence. In this way the deliberation of the criminal trial was outpaced. The assassination of President Kennedy and the coverage of Oswald's detention and death have been regarded as a mark of the immaturity of the electronic media at that time; nationwide television was both new and undisciplined and its effects were unknown.

1. Pre-1963 Law

In the years just preceding the Kennedy assassination, the Supreme Court had occasion to decide a limited number of cases dealing with pretrial publicity. Darcy v. Handy reiterated the contemporary wisdom of 1956 that "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day,"[16/] and held "[i]t is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained

16/ 351 U. S. 454, 462 (1956) citing Holmes J., in Holt v. United States, 218 U.S. 245, 251 (1910).

not as a matter of speculation but as a demonstrated reality."[17] The Court noted that the defendant had neither requested a change of venue or a continuance, nor exhausted his peremptory challenges to jurors, and therefor had failed to insure his claim. The assertion of prejudicial publicity was based on the trial of a co-defendant which had immediately preceded the defendant's and the newspaper reporting of it.[18]

In Irvin v. Dowd, the Court discussed the rule that while a juror may have a preconceived notion about the innocence or guilt of the accused it is sufficient that the juror can set aside his opinion and render a verdict solely on the evidence presented in court.[19] The test, as stated in Reynolds v. United States, was "whether the nature and strength of the opinion formed are such as raise the presumption

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17/ Id, quoting Adams v. United States ex rel. McCann 317 U.S. 269, 281 (1942).

18/ Id. at 462 - 464. "[The Federal District Court] has found that counsel for petitioner conducted a thorough voir dire examination. In all, 49 persons were challenged for cause or excused -- 14 for fixed opinion or bias. Petitioner used 10 of the 20 peremptory challenges allowed him, the Commonwealth only eight." Id. at 463 - 464. A peremptory challenge is one which requires no explanation and the juror is excused for any reason which counsel may determine in his own mind. Otherwise jurors are excused only for cause.

19/ 366 U.S. 717, 722-23 (1961).

of partiality."[20] In Irvin, newspaper headlines and stories carried accounts of line-up identifications, lie detector tests, previous crimes committed by Irvin while a juvenile and as an adult, his refusal to confess and, finally his confession to police and offer to plead guilty in exchange for a 99 year sentence and the prosecutor's refusal and determination to secure the death penalty. A panel of 430 persons were seated for questioning as to their qualifications to be jurors, known as voir dire, and over 90% expressed an opinion as to Irvin's guilt. Of the jury panel that eventually heard the case, ten were never asked if they had a preconceived notion of the defendant's guilt. The Court reversed the conviction because of the trial court's refusal to grant a second change of venue. The relevant state statute permitted only one change and only to an adjacent county.[21]

In Beck v. Washington the Court affirmed the conviction of a well known labor leader for embezzlement over his allegations that both the grand and petit (trial) juries were biased by adverse news reporting.[22] Much of the complained of publicity was not related to the criminal proceedings and examination of the record led the Court

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20/ 98 U.S. 145, 156 (1878). See, also, Spies v. Illinois 123 U.S. 131 (1887); Lisenba v. California, 314 U.S. 219 (1941). Holt, supra, note 16.

21/ 366 U.S. at 726.

22/ 369 U.S. 541 (1962).

to believe that the impartiality of each juror "exceeded the minimum standards" set by the Court in earlier cases and Irvin. To the contention that the judge should have admonished the juries on disregarding adverse publicity, the Court replied that, even so, due process was not presumed to be violated without a showing on his part of actual bias.

The Court reversed the conviction in Rideau v. Louisiana because a change of venue had been denied after the local community had been exposed to a filmed confession.[23/] In Rideau the filmed confession was televised on three consecutive days and trial commenced some two months later.[24/] The dissenters make significant the lack of a nexus stated between the publicity and the trial, and the case now stands for the proposition that a point is reached when the adverse publicity becomes so pervasive that a link of causality will be presumed. It is clear that counsel was required to move for the change of venue and exhaust his challenges to the jury to preserve the prejudicial publicity issue, which then becomes one of the state of mind of the jurors in light of the amount of publicity. In Rideau the Court presumed for the first time that the jurors could not be unbiased. The Court did not require a showing of actual prejudice or a demonstration of the nexus between the televised confession and the trial because the probability was so high as to be presumed.

23/ 373 U.S. 723 (1963).

24/ The Rideau case must also be considered on the basis of involuntary confession as well as pretrial publicity.

2. Law of the Case

Whether Lee Harvey Oswald could have been tried in Dallas after the extensive public exposure of November 22nd through 24th is a mixed question of law and fact. As the case would develop in the State of Texas, the number of peremptory challenges, and, to a limited extent after Irvin, the change of venue would be governed by Texas law. The question of continuance would also have been raised and would be subject to the judge's discretion. It seems reasonable to assume that with a significant continuance, and appropriate change of venue and a rigorous voir dire examination, prejudicial pretrial publicity could have been mitigated as a Constitutional objection to a fair trial and a fair trial given. This does assume, however, that Dallas authorities ceased making significant contributions to the adverse publicity.

Whether the exposure of Oswald to the press in the corridor, at the line-up room and in the transfer process raised the probability of bias to a presumption of bias is an entirely speculative question; the legal framework is insufficient for analysis. However, speculating that it was possible to provide Oswald with an unbiased jury does not infer that it was probable.

The Warren Commission expressed its own misgivings about the capacity for Oswald to have a fair trial. 25/

> "A fundamental objection to the news policy pursued by the Dallas police however, is the extent to which it endangered Oswald's constitutional right to a trial by an impartial jury. Because of the nature of the crime, the widespread attention which it necessarily received, and the intense public feelings which it aroused, it would have been a most difficult task to select an unprejudiced jury, either in Dallas or elsewhere. But the difficulty was markedly increased by the divulgence of the specific items of evidence which the police linked Oswald to the two killings. The disclosure of evidence encouraged the public, from which a jury would untimately be impaneled, to prejudge the very questions that would be raised at trial.
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> "The disclosure of evidence was seriously aggravated by statements of numerous responsible official that they were certain of Oswald's guilt. Captain Fritz said that the case against Oswald was "cinched." Curry reported on Saturday that "we are sure of our case." Curry announced that he considered Oswald sane, and Wade told the public that he would ask for the death penalty." 26/

The Warren Commission made no conclusion as the ability of the State of Texas to give the fair trial before an impartial jury that was mandated.

25/ It is impossible to speculate to the extent of continued publicity after Oswald was shot, had he survived. The Warren Commission was founded by Executive Order 11130 on November 29, 1963, 28 Fed. Reg. 12789, and its creation, in light of a prospective trial of Oswald is dubious. Had the Commission been created notwithstanding an Oswald trial pending, and had conducted itself in the manner in which it did in fact, the Commission would not have been a source of prejudicial publicity.

26/ WCR 238-239. The American Bar Association and the local bar concurred. See, Warren Commission Exhibits 2183, 2184.

Most poignant of the problems of a fair trial before an impartial jury in Texas in 1963 was the case of Billie Sol Estes. Estes, a much publicized financier, was tried and convicted of swindling in 1962, and the trial itself was of notoriety: initially the case was transferred some 500 miles to avoid undue publicity and secure an impartial jury. Defendant's counsel moved to exclude all cameras from the courtroom during trial, a hearing was held on the motion, and the motion was denied. During the two day hearing, the procedings were televised live locally. Subsequently the judge became more restrictive and by the time of trial, all cameras were relegated to the rear of the courtroom and television cameras were restricted to a booth. Only the prosecutor's opening remarks to the jury and his summation were televised live, although a complete silent record was made for use as a backdrop for reporting of the trial on evening news programs. Defense counsel maintained throughout that the publicity was prejudicial to his client and continued to object.

The Texas Court of Criminal Appeals affirmed Estes conviction on January 15, 1964, over appellate contentions that he had been denied a fair trial because of extensive pretrial and trial publicity.[27/] Given the proximity with which this appellate ruling would have preceded Oswald's trial, and the relatively greater notoriety which Oswald

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27/ Unreported. See Appendix A, Petition for Certiorari, Estes v. Texas, (U.S.) No. 64- 256. While the details of the decision may not be of legal precedential value, it is obvious that the affirmance of such a notorious Trial and conviction would have been widely announced by the same press that covered the trial.

associated with him, it seems reasonable to conclude that the Estes trial would have set the standards for publicity in the Oswald case. With the Texas Court of Criminal Appeals ruling as the dominant standard of law, it is possible that Oswald, like Estes, would petition the Supreme Court for Certiorari on this ground.

3. Development of the Law Since 1963

In Estes v. Texas the Supreme Court held that the televising of pretrial procedings, and exposing the community from which the potential jury would be selected to those hearings, involved a probability that prejudice to the accused would result.[28/] This holding was not based on publicity before the change of venue, but solely on the basis of publicity of pretrial and trial procedings after the change of venue. Accordingly, the Court applied the rule from Rideau that, where such a probability exists, isolatable prejudice need not be proven but will be presumed, and the trial be deemed lacking in due process. Under the same reasoning, the potential (assumed) Oswald conviction would be reversible on appeal -- if not under the proven prejudice test in Irvin, then the presumed prejudice in Rideau and the misguiding precedent in the Texas decision of Estes.[29/]

28/ 381 U.S. 532, 542 - 544 (1965)

29/ The prospects of a retrial without the prejudicial effects of publicity present vexing problems. Determining at what point the former trial was prejudiced is one matter of speculation, but an attempt to determine the time frame for a Supreme Court decision, assuming that it would follow Estes, and that its pendency would not alter the result in Estes, becomes quite another matter of speculation. This paper does not seek to devolve on the mysticism necessary to conclude Oswald's legal guilt but merely to examine the constitutional problems attendant a potential trial. This speculation is, therefore, respectfully declined.

Since Estes, there have been significant developments in the free press - fair trial dilemma which lead to a sophisticated practice at the present time, but still without a definite solution. Sheppard v. Maxwell combined many of the factors of Irvin and Estes.[30] Sheppard was convicted of murder in 1954 and his petition for certiorari was denied in 1956. On a habeas corpus petition a decade later, however, the Court noted that unlike the Estes jury, the Sheppard jury was not sequestered and was subject to massive newspaper, radio and television coverage when not in the courtroom; much like Irvin, only without even a formal change of venue. "The press coverage of the Estes trial was not nearly as massive and pervasive as the attention given by the Cleveland [Ohio] newspapers and broadcasting stations to Sheppard's prosecution."[31] In the Sheppard case, the coroner's inquest had been broadcast and numerous editorial comments urged the prosecution of Dr. Sheppard. While it would appear, from the cases, that the approach of the news media had become more subtle in the eight years between the Sheppard and Estes prosecutions, the effects on the jury which would be drawn from the exposed populace were becoming a greater concern. The Court took the posture in Sheppard that reversals were merely corrective and that prophylactic measures must be taken:

> "The courts must take such steps by rule and regulation that will protect their processes

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30/ 384 U.S. 333 (1966).

31/ Id. at 353 - 354.

> from prejudicial outside interferences. Neither prosecutors, counsel for the defense, the accused, witnesses, court staff, nor enforcement officers should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." 32/

More recently the Court has struck down a Wisconsin statute which, as interpreted by the Wisconsin Supreme Court, prohibited a change of venue in misdemeanor cases. In Groppi v. Wisconsin the Court held that a statute which removes venue as an alternative relief is constitutionally infirm when a defendant must move a change of venue in order to secure an impartial jury. 33/ The statute in Groppi applied to the granting of a motion for change of venue in felony cases, but as interpreted, prohibited a change of venue in misdemeanor cases and was thus akin to the operative results of the statute in controversy in Irvin.

The most recent case on the free press - fair trial dilema to receive the plenary attention of the Court was Nebraska Press Association v. Stuart. 34/ Judge Stuart had entered an order in a murder case before his court restraining the press from reporting a variety of subjects because there was "a clear and present danger that pretrial

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32/ 384 U.S. at 363.

33/ 400 U.S. 505 (1971).

34/ 427 U.S. 539 (1976). In the interim preceding Stuart the Court had reaffirmed the right of a free press in the Petagon Papers case, New York Times Co. v. United States, 403 U.S. 713 (1971). See, also, the in chambers opinion of Mr. Justice Powell as Circuit Justice in Times Picayne Publishing Corp. v. Schulingkamp, 419 U.S. 1301 (1974).

publicity could impinge upon the defendant's right to a fair trial."[35] The Nebraska Supreme Court balanced the presumption of the constitutional invalidity of prior restraint against the defendant's constitutional right of a fair trial and modified the order by narrowing its restraints.[36] Thus, the frontal question in Stuart was not merely the prejudicial publicity involved, but whether the means utilized to protect the defendant's right to a fair trial were barred by the right to a free press. Stuart was the first case in which the Court necessarily focused on the remedies to the constitutional dilemma, and not merely whether a sufficient dilemma existed in the facts to mandate reversal of a conviction.

The County Court order, which, as modified, was the subject of the Supreme Court's attention, prohibited release or publication of evidence or proceedings by all parties in the case, attorneys, court personnell, public officials, witnesses and "any other person present in Court."[37] The appeals of this order was prosecuted by the Nebraska Press

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35/ 427 U.S. at 542, quoting Judge Stuart's finding.

36/ State v. Simants, 194 Neb. 783, 236 N.W.2d 794 (1975). The Nebraska Supreme Court also balanced the right to a speedy trial under the more restrictive Nebraska statute (requiring commencement of trial within six months of arrest), which will be discussed infra, notes 151-152.

37/ 427 U.S. at 576. The fact that the order lapsed by its own terms when a jury was impaneled and sequestered, and the means by which jurisdiction over the press were obtained, are beyond the scope of the present inquiry.

Association representing the members of the press who were present in court when the order was issued. No attorney or officer of the court or their subordinates appealed and the issue was therefore strictly limited to the right to a free press.[38] The Court found the record lacking of analysis of the traditional lesser remedies -- change of venue, postponement, rigorous voir dire, emphatic and clear instructions to the jury and sequestration -- and a misunderstanding of the authority for closed pretrial hearings.[39] Thus, the "heavy burden imposed as a condition to securing a prior restraint was not met" and the Nebraska Supreme Court's affirmance and modification were reversed.[40]

A recent case, which received less than plenary review by the Court, further delineates the scope of potential remedies. The Court described Philadelphia Newspapers, Inc. v. Jerome in the following terms:

> "The proceedings below were brought to gain access by the press and public to pretrial suppression hearings in three separate state criminal proceedings. Access was denied and the trial judge closed all pretrial hearings and sealed and impounded all papers, documents, and records filed in the cases. The judge also prohibited the parties, their attorneys, public officials, and certain others, from disseminating information concerning the hearings." 41/

38/ The question of "gagging" lawyers and their clients is discussed infra, at notes 74-103, and accompanying text.

39/ 427 U.S. at 563 - 564, 568.

40/ 427 U.S. at 570. Simmant's conviction was not under consideration in this case and the decision did not affect it.

41/ --U.S.-- , 46 U.S.L.W. 3434 (No. 77-309, January 9, 1978).

On an insufficient record, however, the Court remanded the case for further clarifying proceedings. No indication was given as to the merits of the order, although it may be speculated that the order does not contain constitutional infirmities.[42/]

42/ The case was vacated and remanded because the record did not indicate whether the Pennsylvania Supreme Court was basing its decision on the Federal Constitution or independent state grounds. If the Pennsylvania Supreme Court's decision was based on independent state grounds (i.e. the rule permitting the hearings to be closed), the United States Supreme Court would lack jurisdiction to review the decision unless the state ground were unconstitutional. 28 U.S.C. 1257 (1970). The dissent focused on this particular jurisdictional issue -- not the merits.

F. Alternative Remedies

The use of the various remedies to mitigate prejudicial pretrial and trial publicity is often within the discretion of the trial judge. The standards--to the extent that standards exist--are also so nebulous that appellate tribunals often must assert their own interpretation of the facts from the trial record. The lower courts have dealt with the problems of a free press and fair trial dilemma on an ever increasing scale and these decisions provide a complicated, and often unclear, value structure within the Supreme Court's basic framework. The five cognizable areas of actions which are remedial and preventative are (1) change of venue, (2) continuance or postponement of trial, (3) Voir dire, (4) sequestration of the jury, and (5) retraints on the press and parties.

1. Change of Venue

Change of venue has been a traditional remedy for insuring a fair trial despite prejudicial publicity. As has already been discussed, in Sheppard and Rideau the change of venue was necessary and ignored; in Irvin and Groppi the limitations on change of venue were struck down as unconstitutional; and in Estes the change of venue was ineffective. The physical act of a change in venue usually requires some delay or continuance, but for the present that delay will be ignored. As this remedy has been the most common, is discretionary and relatively simple and unchallenged unless denied, the intricacies of the practice need not be explored. The Federal Rules of Criminal Procedures provides for change of venue on motion of the defendant if the court is satisfied that he cannot receive a fair trial 43/

43/ F. R. Crim. P 21(a).

and this decision is not reviewable except for an abuse of discretion.[44] Despite the commonality of the motion there are easily overlooked problems in changes of venue including jury of the vicinage,[45] conflict with other rights[46] and convenience in the administration of justice.[47]

2. Continuance

Continuing a case or postponing trial until pre-trial publicity has dissipated is equally, if not more, common. Obviously the length of a continuance to mitigate pre-trial publicity will depend on the

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44/ Silverthorne v. United States, 400 F. 2d 627 (9th Cir., 1968); Bostick v. United States, 400 F. 2d 449 (5th Cir., 1968) cert denied, 393 U.S. 1068 (1969), 396 U.S. 890 (1969); Adjmi v. United States, 346 F. 2d 654 (1964). Cf Mastrian v. McManus, 554 F. 2d 813 (8th Cir., 1977), cert. denied 97 S. Ct. 2985 (1977).

45/ Const. of the United States, Art. III, Sec. 2, Cl. 3. Apparently the conflict between the right to a jury of citizens of the locality and the right to an impartial jury has never been squarely raised. Of course, if the defendant must make a choice among rights, undoubtedly he would choose the impartial rather than local jury. The question is whether this conflict focuses a premium on maintaining an unbiased community from which an impartial and local jury can be impaneled.

46/ In United States v. Bryant, 153 U.S. App. D.C. 72, 471 F. 2d 1040 (1973) cert. denied 409 U.S. 1112 (1973), the defendant was represented by counsel from the Legal Aid Agency who was termed "invaluable" because of special competency with the accused's only defense. Pretrial publicity mandated a change of venue to another district, but the authorization for the legal aid agency prohibited its attorneys from "follow[ing] the case outside the District." Situations such as this could raise, although it was here avoided, unseemly conflicts between the right to effective assistance of counsel and an impartial jury.

47/ In United States v. Addonizio, 451 F. 2d 49 (3rd Cir, 1972), the trial of a former Mayor of Newark was transferred to Trenton to avoid the effects of pretrial publicity and then transferred back to Newark for convenience in the administration of justice. F.R. Crim P. 21(a), 21(b).

extent of that publicity. In some cases two months may be sufficient; in others two years may not.[48] Much of the discussion of continuance is reserved for the counterdiscussion of the right to a speedy trial,[49] but it is most common that continuance and change of venue are used singly or together in most cases with pretrial publicity problems.[50]

3. Voir Dire Examination and Jury Polls

A third alternative goes to the heart of determining prejudice or bias in a juror due to pretrial publicity—voir dire. Initially, voir dire is designed to determine the qualifications of a person to sit as a juror, but it is also a process for eliciting information which is more specific than general qualifications on which challenges for cause and peremptory challenges can be based. Under the Federal Rules the conduct of voir dire by the judge or by counsel is a matter of the judge's discretion.[51]

48/ Two months was insufficient in Rideau, but was not in Mastrian; two years was sufficient in the case of Welch v. United States, 371 F. 2d 287 (1966) cert. denied U.S. 385 U.S. 957 (1968) (Oklahoma Supreme Court Justice convicted of income tax fraud), but would it have been sufficient in the Oswald case?

49/ See, infra, notes 143-154, and accompanying text. The commonness of continuance leads to this abbreviated discussion; indeed, in many jurisdictions, unopposed motions for continuance may be granted by the Clerk of Court. This, in turn, has lead to concern over the speed at which the judicial process operates. See, e.g., United States v. Silverthorne, supra, note 44; United States v. Jones, 542 F2d 186 (Cert. denied, 401 U.S. 945 (1971) (generally); United States v. Bloom, 538 F.2d 704 (5th Cir., 1976), cert. denied, U.S. (1977) (lawyers schedule); United States v. Toy, 157 U.S. App. D.C. 152, 482 F.2d 741 (1973) (negligence and crowded docket).

50/ See, Addonizio, supra, note 47; Mastrian, supra, note 44; and Jones, supra, note 49.

51/ F. R. Crim. P. 24(a). United States v. Brown, 540 F. 2d 364 (8th Cir. 1976); United States v. Freeman, 514 F.2d 171 (10th Cir., 1975). The rule requires that if the judge conducts voir dire, trial counsel be allowed to supplement the questioning. Much of this [illegible] and local practice.

The manner of examination on questions of pretrial publicity has been important in individual cases,[52] but the mainstream of the law has focused on the extensiveness of examination. Often the extensiveness of the examination will depend on the judge's initial perception of the pretrial publicity problem and counsel's vociferousness in pressing the issue. The preferred method appears to be to elicit responses from the array of jurors on general questions of publicity, followed by individual questioning of jurors who were responsive on questions of the amount, type and detail of publicity and whether they had formed any opinions on the subject.[53] The submission of questions by counsel to the

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52/ United States v. Collabella, 448 F.2d 1299 (2nd Cir., 1971) (potential for jurors to be infected by judge's bias).

53/ United States v. Liddy, 166 U.S. App. D.C. 95, 509 F.2d 428 (1974), cert denied, 420 U.S. 911 (1975); United States v. Akin, 562 F.2d 459 (7th Cir. 1977).

An exceptional example of voir dire was Judge John J. Sirica's examination in the trial of H.R. Haldeman, John D. Ehrlichman and John N. Mitchell for conspiracy, obstruction of justice and perjury in the Watergate Affair. This voir dire lasted over eight days, filled over 2,000 pages of transcript and eliminated 170 of the 315 people summoned. An outline of the examination follows:

I. Ability to be sequestered (group)
II. Relationship with parties, counsel, etc. (group).
III. Previous jury service, etc. (groups of 12 to 18).
IV. Employment, attitude, publicity (individually).
  A. Belief in any ones guilt? (before mentioning pretrial publicity).
  B. Heard of the case? Anything in particular?
  C. Seen defendants or lawyers in newspaper or on television? Remember anything in particular?
  D. Which newspaper? How regular? What television news?
  E. Follow legislative inquiries? Read any books on Watergate?
  F. Follow the case closely or casually? Discussed the case?

judge is common, but the judge is bound neither to the quantity nor quality of those questions.[54] The more extensive the voir dire examination is, the less likely it will be reversed on pre-trial publicity grounds; the effect of pre-trial publicity must be proven to a probability.[55]

The factual determination of pretrial publicity will rest on both quantity and quality considerations. The quality of publicity must include both timing and pervasiveness--both exemplified by Estes and Shep-

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53/continued
G. Formed or expressed an opinion?
H. Know or hear of any other trials?
I. What of President's pardon?
J. Could opinion be set aside?
K. Could return of fair and impartial verdict based solely on evidence at trial and court's instructions on law.
V. Juror excused while counsel objected and suggested additional questions, which often resulted in,
VI. Recall of prospective juror for additional questions.

On this voir dire counsel was required to make challenges for cause or involve a peremptory challenge. The court of Appeals held this to be adequate. United States v. Haldeman, et al., 181 U.S. App. D.C. 254, 559 F.2d 31 (1976) (en banc).

It should also be noted here that one case has been dismissed because of prejudicial publicity making it impossible to impanel an unbiased jury. State of Connecticut v. Bobby G. Seale, No. 15844, Superior Court at New Haven, May 25, 1971 (unreported). The oral order is reprinted in Freed, Agony in New Haven, 319-320 (1973).

54/ United States v. Hall, 536 F.2d 313 (10th Cir., 1976). United States v. Vance, 502 F.2d 615 (8th Cir., 1974), cert. denied, 420 U.S. 926 (1975).

55/ E.g. United States v. Caldwell, 178 U.S. App. D.C. 20 543 F.2d 1333 (1976) (failure to prove); United States ex rel. Doggett v. Yeager 472 F. 2d 229 (3rd Cir., 1973) (standard as probability of prejudice, not conclusive proof); Haldeman, supra, note 53.

pard. Quantity must also be balanced with the size and nature of the community in which the crime and trial occurred.[56] The quality of publicity includes questions of admissability of evidence and court rulings, characterizations and opinions. Perhaps the classic problem of pretrial publicity is the detailed press coverage of a suppression hearing[57] or confessions,[58] but not material evidence of record during trial.[59] Press coverage which characterizes the defendant as a "mafia leader" may be prejudicial[60] while the characterization of a "loan shark" may not;[61] the question revolves around whether the usage is accusatory or inflammatory.[62] An opinion by the prosecutor as to accused's quilt while announcing an indictment[63] is

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56/ Compare, Nebraska Press Association v. Stuart, supra note 34, with United States v. Chapin, 169 U.S. App. D.C. 303, 515 F2d 1294 (1975).

57/ E.g. Philadelphia Newspaper, Inc. v. Jerome, supra. note 41.

58/ E.g. Rideau, supra, note 23; Mares v. United States, 383 F.2d 805 (10th Cir., 1967).

59/ United States v. Akin, supra, note 53; United States v. Daddano, 432 F.2d 1119 (7th Cir., 1970).

60/ United States v. Rubino, 431 F.2d 284 (6th Cir., 1970).

61/ United States v. Solomon, 422 F.2d 1110 (7th Cir., 1970) ("not inherently grave or prejudicial," followed by detailed, individual examination about the article).

62/ United States v. Budzunoski, 462 F.2d 443 (3rd Cir., 1972); United States v. Hyde, 448 F.2d 815 (5th Cir., 1971).

63/ United States v. Pfingst, 477 F.2d 177 (2d Cir., 1973) cert. denied, 412 U.S. 941 (1974).

substantially different from that opinion at trial.[64] These considerations will tend to control the initial depth of vior dire to ascertain prejudice or will lead the court to presume prejudice and the use of other alternatives.[65]

It is also a common practice to warn the jurors impaneled not to read newspaper reports or listen to television or radio reports on the case.[66] Often, however, during the course of trial, counsel will move that the jury be polled[67] -- whether sequestered or at large--on an article or news report, and the judge has broad discretion to do so.[68] Where it is shown that the jury has disregarded the warnings and has read articles and formed opinions or discussed the articles, the same standards will apply and a mistrial may be declared.[69]

64/ United States v. Coast of Marine Lobster Co., 538 F.2d 899 (1st Cir., 1976). United States v. Concepcion Cueto, 515 F.2d 160 (1st Cir., 1975). Silverthorn v. United States, supra, note 44. Numerous cases prohibit the statement of opinion by the prosecutor as to guilt to the jury and this differs from a statement that "the evidence process" defendant's guilt.

65/ Margolis v. United States, 407 F.2d 727 (7th Cir., 1969).

66/ United States v. Hyde, supra note 62; United States v. Dadano, supra note 59; United States v. Manning, 440 F.2d 1105 (5th Cir., 1971); Gordon v. United States, 438 F.2d 858 (5th Cir., 1971); United States v. Palermo, 410 F.2d 468 (7th Cir., 1969).

67/ United States v. Word, 519 F.2d 612 (8th Cir., 1975), cert denied, 423 U.S. 934 (1975)

68/ United States v. Brown, 540 F.2d 364 (8th Cir., 1976); United States v. Budzanoski, supra, note 62, (sequestered jury); United States v. Palermo, supra, note (non-sequestered jury). U.S. v. Hoffman, 415 F.2d 14 (7th Cir., (1969), cert. denied 396 U.S. 958 (1969).

69/ United States v. Alessio; 528 F.2d 1079 (9th Cir., 1976); United States v. Hankish, 502 F.2d 71 (4th Cir., 1974); United States v. Thomas, 463 F.2d 1061 (7th Cir., 1972).

The key to this jury practice--both voir dire and polling the jury--is that it is a continuing process, not a singular act or motion. Initially a choice of prospective jurors and alternatives is made, subject to challenge of the array and individually for cause and peremptorially, but this has limited final effects. With up to six alternates, it is possible for the judge to dismiss a juror who has become biased by publicity and seat an alternate at any time before the jury retires to deliberate its verdict and the alternates are dismissed.[70/] At any point during the trial in which the jury's impartiality is thus impugned, remedial steps may be taken without restarting the entire process.

4. Sequestration

Another alternative which specifically insulates the trial process from publicity caused by the trial is sequestration. Sequestering of the jury is usually the result of a defense motion, but the decision to sequester or allow separation is a matter of the court's discretion.[71/] Defense opposition to sequestration, however, cannot be construed as a waiver of the prejudicial publicity issue.[72/] Nonetheless, if a viable allegation of bias is made and based on publicity concurrent with the trial, a sequestered jury should be polled.[73/] Sequestration is limited,

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70/ United States v. Pappas, 445 F.2d 1194 (3rd Cir., 1971). See United States v. Floyd, 496 F.2d 982 (2d Cir., 1974), 404 U.S. 984 (1974). cert. denied, 419 U.S. 1069 (1974); United States v. Hankish, supra, note 69.

71/ United States v. Hall, 536 F.2d 313 (8th Cir., 1976), United States v. Hill, 496 F.2d 201 (5th Cir., 1974).

72/ United States v. Palermo, 410 F.2d 468 (7th Cir., 1969).

73/ See, e.g. United States v. Budzanoski, supra, note 62.

however, to instances where an impartial jury can be seated, but publicity of the trial will be pervasive because of the high cost and great inconvenience involved.

5. Restrictive Orders

The fifth alternative is the issuance of restrictive orders. The burden which must be carried in order to restrict the press directly is heavy and will only rarely, if ever, be borne as has already been mentioned.[74/] In Nebraska Press Association v. Stuart the standard applied was Judge Hand's test whether, "the gravity of the 'evil,' discounted by its improbability, justified such invasion of free speech as is necessary to avoid the danger."[75/] In the same vein, use of the contempt citation to punish publication of prejudicial material is extremely limited and must follow a valid restrictive order.[76/] Direct restraints of the publication are of little validity in most cases—and probably of little use in an egregious case such as Oswald's would have been.

Indirect restrictions on the development of prejudicial publicity provide another type of alternative. In Sheppard v. Maxwell the Court first hinted that procedural limitations could be imposed to minimize prejudicial publicity,[77/] and in Stuart the Court specifically reserved

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74/ Nebraska Press Association v. Stuart, supra, note 34; Near v. Minnesota, supra, note 6; New York Times Co. v. United States, supra, note 34.

75/ 427 U.S. at 539, quoting United States v. Dennis, 183 F.2d 201, 212 (2nd Cir., 1950), aff'd 341 U.S. 494 (1951).

76/ Bridges v. California, supra, note 8; Craig v. Harney, 331 U.S. 367 (1947).

77/ 384 U.S. at 363, as quoted, supra, at page 22-23.

these questions and reached only to the direct restraints for its results.[78] There has been no direct Supreme Court handling restrictions on prosecuting and defense counsel, court personnel, law enforcement personnel and the accused, nor do the Federal Rules touch on the subject. This alternative may be subdivided into three parts: (1) restrictive orders to the parties and their subordinates, (2) supervisory control of court personnel and facilities and (3) enforcement of its orders.

d. Silence orders

"Silence Orders" are a relatively new concept; documentation on the concept before Sheppard has not been found, and, hence, such an order would not be expected in the Oswald trial. The concept of entering an order restricting what counsel for the government and defense, the accused and law enforcement officials may say about a pending case, is first applicable at the accused's first appearance despite whatever prejudicial publicity is attendant to the investigation and arrest of the accused.[79] In United States v. Tijerina, a panel of the Tenth Circuit affirmed the defendant's conviction for criminal contempt for publicly commenting on his case in violation of a court order prohibiting such comments on the basis of protecting the right to a fair trial.[80] "The theory of the defense seems to be that because the order

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78/ Nebraska Press Association v. Stuart, 427 U.S. at 564, n. 8.

79/ More difficult questions will arise with regard to rules of the court which may, or may not, take effect prior to arraignments. See, Haldeman, v. United States, supra, note 53, at

80/ 412 F.2d 661 (1969), cert. denied 396 U.S. 867, 396 U.S. 990 (1970).

was entered for [the defendants'] protection, they cannot be charged with a violation."[81/] This argument was countered with the assertion that the public interest also requires a fair trial and "the concept of a fair trial applies both to the prosecution and the defense."[82/] While it is true that most pre-trial publicity is adverse to the defense, and that the defense can rarely gain from exploiting the media, the court nonetheless took the mandate of Sheppard seriously in making its orders cut both ways. To the contrary, a panel of the Seventh Circuit has held such an order to fail on First Amendment grounds and the insufficiency of findings.[83/] Considerations of a sufficient record aside, there is a dispute over the appropriate test to be applied: whether "reasonable likelihood"[84/] or a "serious and eminent threat" and a "clear and present danger"[85/] must be met.

Discipline of an attorney is often controlled by the principles of professional responsibility rather than criminal law. Yet a blanket or categorical rule against comment on all pending cases--criminal and civil--is constitutionally infirm.[86/] Rules often pose significantly greater problems than individual orders because it is necessary to anticipate the facts rather than restate them. Chicago Council of Lawyers

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81/Id. at 666.

82/ Id.

83/ Chase v. Robson, 435 F.2d 1059 (7th Cir., 1970).

84/ Held sufficient in Tijerina, supra, note 80, at 666.

85/ Held necessary in Chase, supra, note 83, at 1061.

86/ In Re Oliver, 452 F.2d 111 (7th Cir., 1975), cert. denied, 427 U.S. 912 (1976).

v. Bauer presents that very issue as applied to a Federal District Court's local rules.[87] The rule in question was "substantially the same" as the American Bar Association Code of Professional Responsibility Disciplinary Rule 7-107(A) - (E), except for an introductory clause in the courts rules requiring lawyers to make no comments "that would have a 'reasonable likelihood' of interference with a fair trial or prejudice."[88] Additionally, the court analyzed the individual sections of the rule, and in so doing, has provided significant illustrations of problems involved in both rules and orders

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87/ 522 F.2d 242 (7th Cir., 1975), cert. denied, 427 U.S. 912 (1976).

88/ Id at 252, n. 9. Disciplinary Rule 7-107(A)-(E) provides as follows:

DR 7-107 Trial Publicity.

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
  (1) Information contained in a public record.
  (2) That the investigation is in progress.
  (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
  (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
  (5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
  (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
  (2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
  (3) The existence or contents of any confession, admission, or statements given by the accused or his refusal or failure to make a statement.

FOOTNOTE 88/ cont'd

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
(5) The identity, testimony, or credibility of a prospective witness.
(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107 (B) does not preclude a lawyer during such period from announcing:
(1) The name, age, residence, occupation, and family status of the accused.
(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
(3) A request for assistance in obtaining evidence.
(4) The identity of the victim of the crime.
(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
(6) The identity of investigating and arresting officers or agencies and the length of the investigation.
(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
(8) The nature, substance, or text of the charge.
(9) Quotations from or references to public records of the court in the case.
(10) The scheduling or result of any step in the judicial proceedings.
(11) That the accused denies the charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

The general infirmity in these rules was the failure to incorporate the "serious and imminent threat" standard:

> "Lawyers must be aware of exactly what areas of speech might pose a serious and imminent threat to interference with a fair trial. The serious and imminent standards must always be an element of any prohibition. [footnote omitted]. We think that it is proper to formulate rules which would declare that comment concerning certain matters will presumptively be deemed a serious and imminent threat to the fair administration of justice as to justify a prohibition against them" 89/

The court proceeded to analyze the individual rules to ascertain whether each section would be affirmed under the seious and imminent threat standard, and in so doing provided an instructive discussion on the acceptable proscriptions in both rules and orders. 90/

The first section restricts attorneys "participating in or associated with "an investigation from disclosing information not in a public record except that an investigation is in progress, its general scope, requests for public assistance and warnings as to potential danger. 91/ The court noted that the initial coverage or applicability was ambiguous and further considered

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89/ Id. at 251.

90/ The court noted that Local Rule 1.07 was substantially verbatim from the recommendations of the Committee on the Operation of the Jury System, Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue (September, 1968), 45 F.R.D. 391 (1968). This Report, known as the Kaufman Report, was adopted by the Judicial Conference of the United States, but because a court rule only when adopted by individual District Courts. See, infra, at notes 129-134 and accompanying text. The further review done by the court in Bauer as part of its adjudicatory function must be contrasted with the courts internal legislative function.

91/ DR 7-107(A), supra note 88.

the inappropriateness as applied to defense lawyers and counsel to grand jury witnesses.[92] The court concluded that this section "could be used as a presumption of a serious and eminent threat, but only as to attorneys associated with the investigation on behalf of the government."[93] While this type of rule is potentially restrictive,[94] these very matters can be just as prejudicial.[95]

The next two sections concern public statements between presentation of a formal charge or arrest and the commencement of trial. The prohibition against statements on character, reputation or prior criminal record; the possibilities of plea bargaining; confessions, admissions or statements of the defendant and results of examinations or tests are prohibitable because of their potential inadmissability and highly prejudicial character.[96] The fifth prohibition amounts to the basic control of the witness list; and, in addition to the concern of the court that this be construed narrowly, a byproduct insulation against third-party attempts to suborn perjury is evident.[97]

92/ 522 F.2d at 252-253.

93/ 522 F.2d at 253.

94/ See the Department of Justice's regulations in 28 C.F.R. 0.50 (1976), discussed, infra, at note 102 and accompanying text.

95/ See the factual introduction to Nebraska Press Association v. Stuart, supra, note 34, and Simants v. Nebraska, supra note 36.

96/ 522 F.2d at 254-255 discussing DR 7-107(B)(1)-(4).

97/ 522 F.2d at 255 discussing DR 7-107(B)(5).

The final prohibition--on giving opinions as to evidence, merits or the guilt of the accused--requires a more precise review. Both opinions as to guilt and evidence are traditionally prohibited in court and the need to curtail extra judicial statements to that effect is parallel to the reasons discussed previously. The court avoided stating whether prohibiting discussion of the "merits" was constitutional because it could not define the term. If, however, the term was to be construed in narrow and concrete terms related solely to an individual case, in harmony with the chord the court was then striking, then it was likely to pass constitutional muster.[98/] The provisions of the next section were not discussed because of their permissive nature; eliminating particular facts from preclusion of the previous section.

The court found the District Court's deviation from the ABA rules potentially saving in the provision prohibiting comments on the trial, parties or issues during selection of the jury and trial; the ambiguous and probably overbroad "other matter" clause had been struck. In upholding the limitations at this stage, the court was more concerned with the lesser or concurrent alternatives in sequestration or a bench trial.[99/]

The court finally noted that restrictions on comments between the end of the trial and sentencing could never become a serious and imminent threat to the fair administration of justice because the sentencing judge

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98/ 552 F.2d at 255 discussing DR 7-107(b)(6).

99/ 522 F.2d at 255-257 discussing DR 7-107 (D) as modified by the District Court.

was entitled to consider all available information, including the attorney's comments, in reaching his sentencing decision.

Bauer is important, and discussed at such length here, because it represents the only constitutional analysis of the ABA Code of Professional Responsibility as adopted by a District Court. Whether a statement violates one of the affirmed rules will be subject to debate before a court, but the the presumption will be for the violation and the burden will rest on the attorney to prove that there was no serious and imminent threat to the fair administration of justice from his statement. In the limited cases where such orders have been issued, preliminary problems such as jurisdiction have inhibited review of the orders at the instance of the press.[101/]

It is important to note here that the Justice Department has also taken steps to restrict disclosure of prejudicial information by its attorneys. By rule, within its authority, the Justice Department has permitted disclosure of many of the same elements or facts permitted in the ABA Code of Professional Responsibility and the District Court rules in Bauer, but these are premised on a presumption that Departmental attorneys are not to make public statements on criminal matters.[102/]

100/ 522 F.2d at 257 striking DR 7-107(E). The court went on to consider the civil application of the rule which is not relevant here.

101/ Compare, Central South Carolina Chapter, Society of Professional Journalists v. United States District Court, 551 F.2d 559 (4th Cir., 1977) (mandamus denied; appeal dimissed), with, CBS, Inc. v. Young, 522 F.2d 234 (6th Cir., 1975) (mandamus issued; order dissolved for lack of evidence of a "clear and imminent danger"). With these cases the question of the media's right to gather information is necessarily raised.

102/ 28 C.F.R. 50.2(b) (1977); U.S. Attorneys' Manual 1-5.540 (September 15, 1976), 9-2.211 (January 10, 1977). (Authority: 5 U.S.C. 301; 28 U.S.C. 509, 516 (1970).

The intent and flavor of these personnel regulations are summarized in one statement:

> "Disclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public."103/

b. Closing Orders

The proposition that a court can control its own personnel and facilities is not readily questioned as a matter of law. It was the failure of the court to maintain decorum by such an order which ultimately lead to Sheppard, but the prospect of this control goes much further than courtroom decorum, seating arrangements, prohibition of cameras and recording,104/ and sundry other resorts.105/ The pertinent question here is the authority to close pretrial procedures to the press and public. This remedy must be balanced with the dicta from Craig v. Harney that "A trial is a public event. What transpires in the courtroom is public property"106/ Here again, however, trial must be segregated from "pretrial" where most prejudicial publicity originates. The right to a public trial is, in the first instance, the defendant's; considerable

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103/ 28 C.F.R. at 50.2 (b)(3)(iv).

104/ F.R. Crim. P. 53.

105/ See, Mazzetti v. United States, 518 F.2d 781 (10th Cir., 1975), (photographing prisoners from inside courthouse parking lot).

106/ 331 U.S. 367, 374 (1947).

questions of the public's right and those of the press are dependent on the accused.

It is important to note at the outset the striking differences in public access: grand jury proceedings are traditionally secret and unauthorized disclosure is criminally sanctioned[107] while criminal contempt before a grand jury requires a trial in public.[108] Exclusion of the public compelling needs have included avoiding threats and intimidation of a witness[109] and protection of the integrity of an anti-skyjacking passenger profile.[110] Only recentl has the issue of exclusion of the public and the press from pretrial hearings in light of potentil prejudicial publicity com to ; the fore. Hence, two volatile cases are poceeding through the judicial system at present which ask whether such an exclusion violates the first Amendment guarantees of a free press and the Sixth Amendment policy of a public trial.[111] Both cases involve exclusion from

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107/ 18 U.S.C. 1508; F.R. Crim. P. 6(d),(e).

108/ Levine v. United States, 362 U.S. 610 (1960).

109/ United States ex rel. Bruno v. Herold, 408 F.2d 125 (2d Cir., 1939).

110/ United States v. Bell, 464 F.2d 667 (2d Cir., 1972). But, United v. Clark, 475 F2d 240 (2d Cir., 1973). (Anti-skyjacking procedure--exclusion of defendant from entire suppression hearing where cautionary instructions to witnesses would have sufficed). Since Judge Mansfield concurred in Bell and wrote the opinion in Clark, the appropriate and only consistent construction is that the exclusion was minimal in Bell and too broad in Carter, while at the same time the basis for the search initially was substantial in Bell, but not Carter. Thus these cases must be distinguished on the part of exclusion of the defendant and the degree of compelling interest.

111/ United States v. Cinafrani, --F.2d--(3rd Cir. No. 77-2445 and 77-2462, March 16, 1978); Gannett Co. v. DePasquale, 43 N.Y.2d 370, 372 N.E. 2d 544, 401 N.Y.S.2d 756 (1977), cert. granted, -- U.S. --, 46 U.S.L.W. 3679 (no. 717-1301, May 1, 1978). See, also Philadelphia Newspaper, Inc., v. Jerome, supra, note 41 and accompanying tests.

a suppression hearing, and both cases stand on the narrowest possile missable evidence only if it is determined to be admissable, it is equally axiomatic that the question of law is not asnwered with any authority. grounds excluding the public and press from the least amount of court room procedure -- the introduction of the very substance of the material to be considered for suppression. While the de minimus grounds for exclusion would appear to coincide with the maintenance of a shroud over potentially inad-

In pre-trial procedures the rights of the press and the public are parallel; the right of the press is tantamount to a right to gather information.[112/] The rights of the public and press continue to parallel at trial when the right is solely the defendant's -- to assert, waive or lose.[113/] The teaching of United States v. Gurney accords these principles by denying access by the press at trial to: (1) grand jury testimony, (2) names and addresses of jurors, (3) bench conferences with counsel, (4) exhibits which had been identified but not yet received into evidence and (5) proffers of testimony received by the judge in camera.[114/]

112/ Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). In each of these cases the Court held that the press had no greater rights than the public.

113/ Singer v. United States, 380 U.S. 24 (1965); Geise v. United States, 265 F.2d 659 (9th Cir., 1949); United States v. Sorrentino, 175 F.2d 721 (3rd Cir., 1949).

114/ United States v. Gurney, 558 F.2d 1202 (1977)(petition for cert. pending.

The special significance of Gurney is in the Fifth Circuit's affirmance of this broad spectrum of communications which had been withheld from the press, not only before trial, but during and after trial.[115]

Given the degree of control over publicity which might be asserted by a district court, it is necessary to consider whether these orders could be actually enforced. There is no realistic means of preventing a member of the bar from communicating with the press or controlling the press until a violation of a lawful order has occurred.[116] The Justice Department may punish violations of its personnel rules and the District Court may suspend any attorney or try the attorney for criminal contempt for violating its orders. The defendant and witness pose a different problem, one which cannot be resolved here.[117]

c. Enforcement: contempt and the newsman's privilege

When, however, an article or broadcast conveys information which is covered by a silence order or is only in the record of a

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115/ Id. at 1207.

116/ This includes rules, as in Bauer, as well as specific orders. Only the imminent threat of enforcement will deter violation and hence the penalties alone can be considered. See, Wood v. Georgia, 370 U.S. 375 (1962) (sheriff too tangential).

117/ The defendant will often only prejudice his own case by making public statements if the prosecutor has a valid case and remains silent. While it can be said that the government also has a right to a fair trial, the burden of proof over the presumption of innocence remains the government's. It is doubtful that the government could restrict a defendant's First Amendment rights.

closed hearing, the question of the "newsman's privilege" arises. In Branzburg v. Hayes, the Supreme Court held that, while a number of states have statutorily created a privilege,

> "The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection. 118/

At least in one instance a news reporter has been held in contempt on the instant subject. During the Charles Manson trial, the presiding judge undertook to restrict the release of information. Nonetheless a reporter obtained copies of a highly prejudicial and inadmissable statement of a witness which was duly reported under his by-line. Subsequent to the trial, the news-reporter was summoned to show cause why he should not be compelled to reveal his source and, on his refusal to divulge the source, he was found in contempt. 119/ Thus, the violation of such a lawful order is a real operative possibility that may deter the violation prospectively.

FOOTNOTE 17/ continued

Witnesses pose a problem in any trial. The means of control here is probably in not disclosing the exchanged witness lists. If the press does not know whom to interview, it is doubtful that a witness will seek out the press. A cautionary instruction from the bench may be warranted.

118/ 408 U.S. 665, 691 (1972), together with In Re Pappas. (No. 70-94) and United States v. Caldwell, (No. 70-57).

119/ Farr v. Pitchess, 522 F.2d 464 (9th Cir., 1975) (rehearing and rehearing en banc denied), cert. denied, 427 U.S. 912 (1976).

The current state of the legal alternatives available for avoiding prejudicial pre-trial publicity is a product of both concerted and fragmented development. Individual court cases developing the common law in this area are often conflicting, but, at the same time, a core of national debate has occurred which has significantly influenced this development. The heightened awareness of the free press-fair trial issue embodied in the development of the law is partially a product of the floodlight tragedy of the Kennedy Assassination.

G. Development of the Law: National Standards

In its report the Warren Commission studied the free press-fair trial dilemma as it developed in the prospective case against Lee Harvey Oswald and concluded that it would be difficult, if at all possible, to seat an unbiased jury.[120] In response:

> "The Commission recommends that the representatives of the bar, law enformement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial."[121]

From this recommendation a number of committees were conceived and reports published, but only two, because of their potential national scope, will be discussed.

The American Bar Association's Advisory Committee on Fair Trial and Free Press, stipulating its origin at least in part to the Warren Report, issued its first tentative report in December, 1966.[122] The Reardon Report noted a history of discussion without significant use of the restriction on statements by attorneys and commended this alternative highly.[123]

120/ WRC, 238-239.

121/ Id, at 27. Such voluntary standards are discussed in Stuart, supra, note 34.

122/ Advisory Committee on Fair Trial and Free Press, American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, (1966). (Colloquially and hereinafter referred to as the "Reardon Report").

123/ Id. at 76-97. Essentially the recommendation embodied changes in the Canons of Ethics, now the Code of Professional Responsibility. To the extent that these recommendations were adopted, they now appear in Disciplinary Rule 7-107(A)-(E), discussed in Bauer, supra, notes 87-101, and accompanying text.

The second major recommendation suggested similar restrictions on law enforcement officials, promulgated initially as police department policy and rules but subject to judicial enforcement.[124] Thirdly, the Reardon Report combined the more traditional continuance, change of venue and voir dire alternatives in a recommendation on conduct of the judicial proceedings, including exclusion of the public in limited instances.[125] Finally, the Reardon Report recommended a restrictive review of the use of the contempt power.[126] The Reardon Report gave significant credibility to restrictive closing and silence orders, but a major hurdle to be overcome was the standard which the Committee applied to these decisions. The Committee's recommendation of a "reasonable likelihood" standard was apparently intended to induce this type of order, but many courts have since found the standard to be constitutionally deffecient and imposed a higher and more traditional "clear and imminent threat" standard.[127] Conversely, the courts have often excluded the public and press from more pre-trial procedure than necessary and contrary to the Reardon Report's narrowness and these cases have been reversible on appeal.[128] Despite the length of time which the courts and

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124/ Id. at 98-111.

125/ Id. at 112-149. The recommendations on closed hearings were specific that such actions must be as minimally intrusive as possible into the public's right to know, and that closing be ordered on on motion by the defense. The combination of the more traditional alternatives allows an inference that the Reardon Committee sought to strike new ground rather than reorganize traditional legal thinking.

126/ Id. at 150-155.

127/ Bauer, supra, note 87 (applied to the rules promulgated which were essentially those in the Reardon Report).

128/ Bell, supra, note 110; Clark, supra, note 110.

counsel have had to consider these recommendations, little litigation has occurred to affirm or hold unconstitutional the actions recommended.

The second major report was initiated by the Judicial Conference of the United States and is colloquially known as the Kaufman Report.[129] The impetus for this study was not so much the Kennedy assassination or the Warren Commission Report as it was the decision in Sheppard v. Maxwell. The first recommendation of the Kaufman report is a restatement of the Reardon Report recommendation of restricting comments by counsel, although particular word usages reflect specific disagreements and different audience addressed.[130] The Kaufman Report's second recommendation reflects the Committee's concern for judicial housekeeping by prohibiting disclosure of any information or opinion not a part of the public record by any court personnel.[131] The second recommendation contains special significance in the exclusion of law enforcement officials, who may or may not be within the court's jurisdiction control, and the inclusion of the possibility of closed hearings. Part 1 of the third recommendation provides for rules on extrajudicial statements by parties and witnesses, management and sequestation of jurors and witnesses, and conduct of the courtroom.[132] Part 2 of that recommendation concerns liberalized

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129/ Committee on the Operation of the Jury System, Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1968).

130/ Id at 404-407. Note that the "reasonable likelihood" standard was adopted and Bauer expressly rejected it.

131/ Id at 407-408.

132/ Id at 409-412. On this recommendation, the District Court in Bauer adopted its version of DR 7-107(A)(E).

use of traditional methods.[133] The fourth recommendation of the Kaufman Committee would broaden the proscriptions of Rule 53 of the Federal Rules of Criminal Procedure to control news activity throughout the courthouse.[134]

The development of court rules under these recommendations has been diverse. The learning from the appellate case law and these two tribunals to trial judges may be summarized as follows:

1) Permit continuance, change of venue, extensive voir dire examination, sequestation and polling liberally, and

2) utilize restrictions on attorneys and closed hearings where necessary, but do so on an extensive record.

Before moving to contemporary legislative proposals in this area, it is necessary to consider one development in the law whose intervention has completely post-dated the Kenneday assassination, but would create considerable difficulty in any Oswald case as it does now in all criminal cases.

133/ Id. at 412-413.

134/ Id. at 414-415.

H. Speedy Trial - Introduction to the Trilemma

In discussing the contemporary alternatives available to mitigate prejudicial pretrial publicity, the traditional motion for continuance was reserved for latter discussion.[135] Continuances are all too often routinely granted; but in the case of prejudicial publicity continuances are often necessary. A point will be reached, however, when the granting of a continuance to acquire an impartial jury will collide with the defendant's right to a speedy trial.[136]

This question of Oswald's right to a speedy trial as opposed to his right to an impartial jury probably would not have arisen. As the Supreme Court bluntly asserted in 1972, "although a speedy trial is guaranteed the accused by the Sixth Amendment to the Constitution, the Court has dealt with that right on infrequent occasions."[137] With this opening remark for a unanimous court, Justice Powell proceeded to analyze two lines of thought: 1) that the court should set a time within which a defendant must be offered a trial, and 2) that the Court should consider the right to a speedy trial only when formally demanded.[138] This is not to infer a lack of case law on speedy trial;

135/ Supra, notes 40-50, and accompanying text.

136/ It will be assumed temporarily that this collision cannot be avoided. Whether this assumption is correct will be the focus of later paragraphs. See, infra, notes 149-153, and accompanying text.

137/ Barker v. Wingo, 407 U.S. 514, 515 (1972) (citation omitted). "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial ..." Const. of the United States., Amendment VI.

138/ 407 U.S. at 522-528.

up to this time there had been significant, but sporadic and unconcerted judicial opinion. As the Court noted, and as had been true for the preceding decade, most of the states and Federal Circuits recognized and used some form of a "demand rule."[139] This approach would have put Oswald in the position of possibly choosing to be tried by a biased jury if he wished to be tried quickly. The Court restated the rule against presuming the waiver of a fundamental right from lack of asserting it, but also rejected the legislative function necessary for it to assert that set time for an offer of trial.[140]

The Court developed the balancing test of four factors: 1) length of delay, 2) reason for the delay, 3) defendant's assertion of the right and 4) prejudice to the defendant's case.[141] The length of the delay was in essence a triggering mechanism, not the demand by the defendant, and to this extent the "demand rule" was rejected and the demand was not to be considered presumptive. The reason for de-

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139/ Id at 524. Coupled with the concept of waiver, the right to a speedy trial, and whatever time frame "speedy" amounted to, would not begin to run until demanded.

140/ Id. at 526-528. Since Barker was a state case it did not offer the Court an opportunity to make rules for the Federal Court under its supervisory powers.

141/ Id. at 530.

lay poses its own balancing test, with the Court weighing a deliberate attempt to delay by the prosecution far heavier than overcrowded courts or the valid reason of a missing witness. The defendant's assertion of the right is a counter to the reason for delay, much as is the defendant's causing the delay, but no longer would that assertion be a starting point of analysis. According to the Court, the fourth factor - prejudice - would include interests such as incarceration and impairment of the defense.[142/]

Before analyzing the interplay of Barker considerations with a prejudicial publicity situation such as Oswald's, one further step in the development of speedy trial law should be taken. In rejecting the demand rule the Supreme Court moved away from the prevalent practice, but the Court also stopped short of stipulating a fixed time frame within which a jury trial must be offered. The lower courts began developing a presumptive timetable for speedy trial assertions, and, eventually, Congress interceded with a mandatory timetable.

In 1975, Congress passed the Speedy Trial Act which placed mandatory deadlines on most criminal trials.[143/] Congress' purpose in doing so was "to assist in reducing crime and the danger of recidivism," or, in short, to increase the deterent value of the criminal

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142/ Id. at 530 - 533. Distinguish this usage from the word as used in "prejudicial publicity" although both mean an impairment of ability.

143/ Pub. L. 93-619, 88 Stat. 2076 (January 3, 1975), 18 U.S.C. 3161, et seq. (1970, Supp. 1976).

process.[144] The courts have construed the Act as not marking out the bounds of the Sixth Amendment's guarantee of a right to a speedy trial.[145] Nonetheless, by 1980, the maximum allowable interval between arrest and trial will be reduced by statute to one hundred days.[146] Failure to bring the accused to trial within the time limits will result in dismissal on the defendant's motion, although a number of excuses are available to defend against this motion and avoid

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144/ H.R. Rep. No. 93-1508 (November 17, 1974), 1974 U.S. Code, Cong. and Admin. News 7401.

145/ E. g. United States v. MacDonald, 531 F.2d 196 (4th Cir. 1976).

146/ The limitation are phased in over five years. According to the Act, 18 U.S.C. 3161(b), (c), (d) and 3163, the timetable after passage appears to be as follows:

For Arrests Between:	Maximum days allowed between ARREST and INDICTMENT	Maximum days allowed between INDICTMENT and ARRAIGNMENT	Maximum days allowed between ARRAIGNMENT and TRIAL
July 1, 1976 and June 30, 1977	60	10	180
July 1, 1977 and June 30, 1978	45	10	120
July 1, 1978 and June 30, 1979	35	10	80
July 1, 1979 and Thereafter	30	10	60

the sanction.[147] The excuses for avoiding the sanction are a combination of factors which restrain the running of statutes of limitations and the balancing factors of Barker.[148] One exception of special import is when a judge finds, on a record of sufficient evidence, that the ends of justice to be served by granting additional time "outweigh the best interest of the public and the defendant to a speedy trial."[149]

This discretionary expansion of the time limits for trial could be construed to permit a continuance when prejudicial publicity rises to the level of requiring the presumption of bias, but

. . . . . .

147/ 18 U.S.C. 3162.

148/ 18 U.S.C. 3161(h) provides exclusions from the running of the time limitations for any period of time which: 1) results from other proceedings concerning the defendant, 2) diverts the defendant under an agreement approved by the court, 3) results from the absence of the defendant or an essential witness, 4) results from the defendant's mental or physical incompentence to stand trial, 5) results from a psychiatric study, 6) is required between dismissal of one indictment for correctable error and the issuance of a superseding indictment, or 7) results from a later and properly joined co-defendant.

149/ 18 U.S.C. 3161(h)(8) reads as follows:

> (8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.
>
> (B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:
>
> (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
>
> (ii) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the

no case directly on point has been found.[150] The relative newness of the Act is a significant reason for this lack of opinion, but it should not be discounted on that basis since at least one Supreme Court Justice has considered the problem.[151] Furthermore, more restrictive statutes have existed in the states for some time and have had an impact on the free press - fair trial problem.[152] With this background it is necessary to look at the factors which the Court enunciated in Barker, and which would be applicable in analyzing this exception, to determine whether a direct conflict exists or can be avoided.

First, it must be noted that the judge may order a delay on his own motion, as well as granting a motion for continuance

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Continuation of footnote 149/

prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.

(iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

150/ Of limited opinions currently available from the Courts of Appeals, certain trends appear to emerge in this subparagraph: 1) conflicting schedules of defense counsel - excused; 2) conflicting court calendars - not excused (but see, 3174); and conflicting trial dates of accussed - not applicable under 3161(h)(1)(c).

151/ Brennan, J. concurring in Nebraska Press Asociation v. Stuart, supra, note 34, at 602, n. 28.

152/ See, e.g., Opinion of Brennan J., concurring in Nebraska Press Association v. Stuart, supra, note 34, at 583, n. 10. (Nebraska required trial within six months).

from the defendant or the government.[153] Should this delay be only a few weeks until news stories on the trial are pushed off page one by other more current news, the length of a delay would not, in itself, require a dismissal. Secondly, the reason for the delay must be considered: what is the cause or source of this publicity. Usually the source is the police or prosecutor, arraignment or preliminary hearing at which the indictment is presented or a prima facie case or probable cause is shown, suppression hearings at which inadmissible prosecution evidence is argued, or hearings on the speedy trial - free press - fair trial problem itself. Rarely is it in the best interest of the defense to create pre-trial publicity; in most cases it would be asserted that the government has caused the need for delay. Thirdly, the defendant's assertion, if any, of his right to a speedy trial must be considered, although it will be a rare case that a defendant will wish to proceed to a jury trial in the light of prejudicial pre-trial publicity. Nonetheless. The ultimate question of prejudice will be: must the defendant choose between his constitutional right to a speedy trial and his constitutional right to an impartial jury?

153/ 18 U.S.C. 161(h)(8)(A). quoted, supra, note 149.

I. The Ultimate Conflict

Throughout this discussion a number of a defendant's rights have been discussed, but usually in conflict with the right of a free press. Up to this point, however, the ultimate question has not been posed: Is there a point at which the right of a free press places two or more of a defendant's rights in inextricable conflict? The question necessarily assumes a notorious case, indeed, it assumes the case in which the rights of a free press put the defendant to a complete and formal jeopardy to the preclusion of the legal process. For the defense, the motion would be for dismissal on the grounds of pretrial publicity and only one such case is known to have had such a motion granted.[154/] The problem about to be faced would not have been part of the original trial of Lee Harvey Oswald, nor would it likely have been argued on appeal. But, had the assassination occurred in 1978 rather than 1963 and the parties and media conducted themselves as they actually did in 1963, this problem would be unavoidable. In the contemporary setting this problem has not occurred, but it is possible that it will.

The only assumption necessary for this hypothetical case is that pretrial publicity has been pervasive. Should the question of continuance arise, defense counsel's response may be an assertion of the right to a speedy trial - under the statute and Barker - and he may make this assertion directly. This is merely repetitive of the issue last discussed: If the defendant does not contribute to delay

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154/ State of Connecticut v. Bobby G. Seale, supra, note 53. But see, Delaney v. United States, 199 F.2d 107 (1st. Cir., 1952).

and asserts his right to a speedy trial, the statutory and constitutional right will run, and the judge can only stop the statutory time.

Should the issue of a change of venue under Rule 21(a) arise, defense counsel may respond with an assertion of the right to vicinage.[155/] The rule is only a means by which the defendant may waive his right to vicinage,[156/] and, in this case, the defendant does not do so.

Thus, the problem becomes one of seating an impartial jury. In sheer numbers, the summoning of veniremen has become a major chore in any case involving prejudicial publicity. Naturally voir dire will be extensive, but the question must be asked whether there are some realistic limitations on the size of the venire and the length of voir dire.[157/] Assuming that an impartial jury could be impaneled,

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155/ Supra, note 45. Platt v. Minnesota Minning and Manufacturing Co., 376 U.S. 240, (1964); Salinger v. Loisel, 265 U.S. 223 (1924).

156/ United States v. Hinton, 268 F. Supp. 728 ( ); United States v. Holder, 399 F. Supp. 220 (D.S.D., 1975).

157/ In Haldeman, the court initially summoned 315 people for voir dire examination; in Irwin, 430; the 1977 Hanafi Muslim conspiracy and murder trials, 650; and in the Bobby Seale case nearly 1500 people were summoned, and nearly 1100 questioned over a four month period, before a jury was impaneled.

sequestration remains an option for maintenancing that impartiality. And, of course, it has been assumed that the trial court has not entered any restriction orders.

The classical techniques for mitigating prejudicial publicity do not resolve the free press - fair trial - speedy trial trilemma. A shrewd defense counsel may be able to assert all of his client's constitutional rights and move for a dismissal with prejudice. Under these assumptions there comes a point when the trial judge has no alternative, but to dismiss. Prior to that time, however, significant alternative exist for avoiding this result which the judge and prosecutors may take and these, in their very limited confines, would appear to be the control of the sources of prejudicial publicity.

To this point the notorious case has been assumed. However, much as Congress assumed responsibility for legislating special protection for the President in the wake of the Kennedy assassination, it has not responded to the pressures attendent any future such instances. Had Oswald survived and stood trial, it is improbable that these issues would be squarely raised - but the assumption of these issues in a comtemporary setting is only an assumption of the future assassination of a high official of government, either our own or some foreign emmissary, or the President of the United States.

J. Contemporary Legislative Proposals

A diligent search of bills in the 95th Congress has not yielded any legislative proposals on the free press - fair trial - speedy trial trilemma.[158/] Questions posed to counsel of the appropriate sub-committees of the House and Senate Judiciary Committees corroborate this finding.

158/ S. 1437, 1331, 1335 provides for an affirmative defense to contempt in the constitutional infirmity of a "gag" order. Thus, if the provision is passed by the House and conference committee, an order prohibiting dissemination or publication of information could be the basis for contempt citation only, if constitutionally valid. This provision does not effect the analysis above, notes 104-119, and accompanying test.

K. Legislative Alternatives

Based on the analysis of law and the problems noted previously, there appears to be ample room for legislative activity toward mitigating the prejudicial impact of pre-trial and trial publicity. The potential alternatives listed below are organized by the issues involved, although many of the alternatives involve several issues. This list is neither exhaustive in length nor comprehensive in scope, but is merely suggestive of the areas in which additional thought may be most fruitful.

1. Change of Venue and Vicinage

The concepts of venue and vicinage are comprehended presently by the Constitution, statute and rule. The rules as currently stated provide that which the Constitution requires. When the issue of venue is raised the added court costs are often considered along with the substantive problems of prejudical publicity, but such a consideration does not appear to be consistent with the Constitutional mandate. The Congress may wish to consider the economics of the change of venue problem in the appropriations for courts, the Justice Department, witness fees, and jury fees.

2. Continuance and Speedy Trial

The Speedy Trial Act constricts the instances in which a continuance can be granted. This Act, as already noted, becomes increasingly important in any highly publicized trial.

a. Statute and Constitution. The Congress may wish to clarify the relationship, if any, between the Speedy Trial Act and the Sixth Amendment's guarantee of a speedy trial. The Act's statement of relationship that "[n]o provision ... shall be interpreted as a bar to any claim of denial of speedy trial as required by" the Constitution expresses only the idea that the Act cannot be used as a minimum time which must pass before a claim can be made and does not clarify the Sixth Amendment right.[159/]

b. Administration of Speedy Trial. The Speedy Trial Act provides for planning groups and staff to insure the speedy administration

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159/ 18 U.S.C. 3173 (1970, Supp. 1976).

of this Act.[160] Congress may wish to supplement the appropriation to further insure effective compliance with the Act in light of the potential conflicts just discussed.

3. Voir Dire Examination and Jury Polls.

The voir dire procedure and jury polling have developed in the common law and court rules for a substantial period of time. As noted above, the question is not one of a singular motion to be granted or denied, it is one which requires a continuing review. Because of these two factors and the current breadth of the trial judge's discretion, the idea of legislation in this area appears impractical.

4. Sequestration

Sequestration of the jury prevents exposure to prejudicial publicity only during trial, as well as hampering other improper influences. Because this alternative is particularly expensive for the court and inconvenient for the jurors, Congress may wish to consider:

-- providing additional funds specifically earmarked for prejudicial, publicity cases and jury sequestration,

-- altering the procedure of sequestration to alleviate the discomfort of the jurors, and

-- providing for temporary release of jurors, family visits or other ad hoc mitigating actions.

160/ 18 U.S.C. §3165 - 3171 (1970, Supp. 1976).

The sequestration process is probably under-utilized because of the costs necessarily incurred.

5. Restrictive Orders

Being the newest, and probably least understood, restrictive orders pose the greatest potential for legislative action. Three specific areas might be considered

a. Silence Orders. Congress may wish to consider providing a basis for increased use of silence orders directed to the attorneys in a case. There are a variety of means by which this could be accomplished, including, but not limited to, (i) special jurisdiction for criminal or civil contempt of court for obstructing proceedings, (ii) special jurisdiction to enter orders restricting commentary on cases to which a lawyer is counsel, (iii) special authority granted to District Courts to promulgate rules and specify adherence as a condition of licensure of attorneys, or (iv) direct legislation prohibiting disclosure of prejudicial proceedings

b. Closing Orders. The courts are not clear on their authority to close pretrial hearings. Congress may wish to consider delineating the scope of the right to a public trial by defining the scope of trial and granting authority for or mandating the closing of hearings when prejudicial material will be made a part of the record.

c. Contempt and the Newsman's Privilege. Congress may wish to consider again the newsman's privilege and Branzburg v.

Hayes. Congress may also wish to consider the scope of the contempt power and defenses.[161]

L. Conclusion

The conflict between the rights of a defendant to a fair and speedy trial and those of a free press have increasingly collided over the last twenty years. The trial of Lee Harvey Oswald, had it been held, probably would have illuminated these problems more clearly than any case since and probably would have hastened the development of the law. The development of the law since 1963 has been one of continually refining alternatives, most having developed judicially. It is reasonally certain that, under the law as developed to this day, dismissal of a criminal case in federal court become of prejudicial publicity would not occur. It is still more likely today that a reversal of conviction would result from failure by the trial judge to adequately safeguard the court's process and the defendant's rights. In the alternatives at a judge's disposal, many are fully developed legal tools, but some - such as silence orders and closing orders - remain in a limbo. Here is the best opportunity for legislative action to further mitigate the dissemination of prejudicial information and insulate the criminal trial process.

161/ See, supra, note 157.

III. THIRD PARTY RECORDS INVESTIGATIONS

A second major controversy developing out of the Kennedy assassination revolves around the procurement of third party records during an investigation. A third part record could be any writing which pertains to a person which is in the custody of another person. The "third party" concept derives from the idea that the person to whom the record pertains (probably the owner) is the first party, the government or agency seeking the record is the second party, and the person or agency who is in custody of the record is the third party. The exact scope of third party records investigations will inherently be determined by the individual case, but generally includes purchase and billing records, telephone company records, registrations, bank records and tax records. This area has become increasingly controversial since the Kennedy assassination, not because of the assassination or the investigation which followed, but because of a heightened awareness of the need for a right of privacy. In recent years the concept of a right of privacy has been increasingly argued in the courts as a basis for quashing summonses and subpoenas or subpoenas duces tecum for records held for or by another. This argumentation has also lead to the formalization of some of the right to privacy in the form of state and federal legislation.

On the other hand, access to records in the possession of third parties has also become an increasingly important investigative and prosecutorial tool in the areas of white collar, public integrity, fraud, tax and organized crime. With records normally held by other persons than the accused, the government is able to prosecute with greater ease and reliability than through the process of producing multitudinous witnesses. Testimony is displaced by easily authenticable documents.

In this Chapter, the types of investigation which the Warren Commission reviewed and undertook in their study of Lee Harvey Oswald will be reviewed, and the law related to commercial, telephone, bank, and tax records and their confidentiallity from law enforcement officials will be reviewed within the framework of the Constitutional proscriptions of unreasonable searches and seizures, self incrimination and the right to free communication. Additionally, the concepts of testimonial privilege will be discussed in context with the records sought to be produced.

Certain restrictions should be stated at the outset. Like the investigations of Lee Harvey Oswald, this study will be concerned only with the individual -- and not with corporations, unions, associations and partnerships. These entities, to the extent that they are constitutionally or statorily congnizable from a natural person, pose different problems within the First, Fourth and Fifth Amendments which need not be considered. Additionally, this study will restrict itself to records of an individual or about an indivdual held by another, thus avoiding large areas of Constitutional law involving physical privacy, exigent circumstances and commercial speech, to name but a few. As in the area of speedy trial, the law has developed from almost non-existence since 1963, and the commentary on the state of the law in 1963 will, consequently, be non-existent.

A. The Oswald Investigations

The investigations which followed the assassination of President Kennedy provide a valuable illustration of the state of the art of third party records investigatons then and now. Using these investigations -- both the Dallas prosecution authorities and the Warrent Commission -- as a springboard, it is possible to analyze the changes in both the technique and the law over the last fiteen years.

The first major third party records investigation in the Oswald case commenced with the discovery of the rifle on the sixth floor of the depository Building. Local authorities easily ascertained from local gun dealers that such a weapon[1/] could have been imported by a firm in New York City. A search of the records of that firm revealed that the rifle in question had been sold to a sporting goods outlet in Chicago. A search of those records revealed a microfilm of a mail order purchase and money order from one "A. Hidell". This much had been accomplished by the early morning hours of November 24, 1963. A later investigation of the handwriting on the order form and postal money order confirmed that both were written by Oswald. This investigation of third party commercial records is the only search known to have been performed during the active criminal investigation of the President's death.[2/]

However, a variety of federal government records had already surfaced, and would continue to surface, relating Oswald to the weapon. At the time of Oswald's arrest for killing Patrolman Tippit, a forged Selective Service Registration Card and forged Certificate of Service in the name of "Alek J.

1/ The fact that the weapon was unusual, a Mannlicher-Carcano 6.5mm. carbine (No. C 2766), facilitated this search.

2/ WCR 118-120.

Hidell" were confiscated.[3] From these two separate and independent leads the rifle would eventually by connected to Oswald through handwriting on postal records including post office box applications, entitlement to receive mail, change of address forms and the money order.[4]

After Oswald had been shot and the Warren Commission set up. additional third party record investigations were conducted at the latter's request. These investigations were conducted in order to confirm or dispel the conspiracy theories of the assasination and focus on financial records, both income and expediture.[5] Three major categories of records were reviewed in the Warren Commission initiated investigations: commercial receipt and credit records, bank cash flow and security records and employment income records. It is clear that the Commission was offered or had access to records of the Internal Revenue Service on Oswald's tax obligations.

The FBI interviewed a number of people and collected a variety of documents related to Oswald's employment situation. Oswald was employed by several different firms in sheet metal working, photographic processing, coffee processing and, finally, the school book warehouse[6] and the FBI provided the checks issued to Oswald.[7] The FBI was also successful in locating unemployment checks and related interviewing of Texas agency employees.[8] Slightly

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3/ WCR, 181

4/ WCR, 569-577

5/ WCR 328-333. This stage of the investigation took on may of the characteristics of a criminal tax case.

6/ WCR, 402 - 404.

7/ CE 1161, 1173 - 1177, 1129.

8/ CE 1157.

farther removed are the materials developed on Oswald's education.[9]

The second line of investigation dealt with expenditures, including electricity, gas, water, travel, weapons purchases, hospitalization, post office boxes, subscriptions, printing of Fair Play for Cuba Committee literature, and a fine for disturbing the peace.[10] Many of the records have not been formally presented and only FBI Investigation Reports are provided, but the access to each record or information from each record was necessary to put the analysis together. These actual expenditures were combined with a Labor Department estimate to arrive at Oswald's approximate cost of living.[11]

A third phase focused on cash flow and security. The FBI approached in excess of 150 bank branch officers in the Dallas-Fort Worth and New Orleans Metropolitan areas to ascertain whether Oswald, in his own name or under any of his known aliases or variations of them, had established any kind of a personal account or rented a safe deposit box.[12] This cash flow investigation included a records check at a local credit agency in Dallas.[13] Little cash flow or security information was found, and that fact, in itself, was important to the possibility of a conspiracy and to many complex criminal investigations.

The Oswald investigations covered many kinds of documents, and, because of the magnitude of the nation's distress apparently, all these documents

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9/ CE 1130

10/ CE 1130, 1133, 1134, 1136, 1137, 1139, 1145, 1146, 1154, 1158, 1160, 1166, 1168, 1170-1172, 1177, 1410 and 1411.

11/ CE 1169, 1147

12/ CE 1135, 1163-1165, 1167.

13/ CE 1135.

were freely given. This is uncharacteristic of criminal investigations which result in major tax, white collar, public integrity and organized crime cases as extensive as this, and, therefore, the Oswald case is representative in some ways of law enforcement needs for third party records while being unrepresentative of responsiveness. The key difference was in the amount law enforcement authorities must intially proffer and the extent to which legimate requests for third party records are resisted.

B. The Fourth Amendment: The Right to be Secure in One's Papers

The Fourth Amendment to the United States Constitution provides,

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

For the purpose of this paper much of the law construing the Amendment can be immediately eliminated.[14/] In dealing with books and records held by a party other than the accused a variety of special problems arise in the areas of consent and standing. First, however, the means by which the records are intially obtained must be considered.[15/]

The inherent question is whether a search is reasonable and there is a presumption of reasonableness in the institution of a judicial warrant. The requisites for obtaining a judicial search warrant, and appellate review of a warrant, are probable cause, sworn affidavit, particularity and a disinterested magistrate. Theory for protection of the individual lies in the "dead of the night" abuses which, even today, occassionally happen. The contrary viewpoint of

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14/ I.e., "Terry", stops, vehicular searches, border searches, exigent circumstances, incidents of arrest and the like, which comprise most of the Fourth Amendment law.

15/ The question of scope must be commented on. The Fourth Amendment was initially construed as a property right only, Olmstead v. United States, 277 U.S. 438 (1928); Goldman v. United States, 316 U.S. 129 (1942), but this has given way to the notion that the Amendment conveys a personal right, Katz v. United States, 384 U.S. 347 (1967), United States v. United States District Court, 407 U.S. 297 (1972). All these cases involve intereception of wire communications, which will be discussed, infra, at notes 170-192 and accompanying text.

law enforcement is that in allowing the authorities to choose the point at which records come into their hands will protect those records from destruction. The rigors of obtaining a search warrant are reserved for those instances when the advantage to the government and the opposing party are high - the criminal process. In administrative settings the standard is significantly lower.[16/] The question arises whether the stakes are so great when the documents sought are held by a third party - a party to which the documents do not directly apply - as to require the use of the search warrant's element of surprise.

In many cases the same material can be acquired by subpoena. The subpoena originally was a court process to compel testimony; a subpoena duces tecum compelled the production of material objects or records. However, Congress asserted it had the power to subpoena for its own investigations[18/] and has granted authority to issue administrative summons to a number of investigatory agencies.[19/] While the subpoena, historically, did not fall within the ambit of the Fourth Amendment, the courts have required application of Fourth Amendment principles to the subpoena process and its scope.[20/] The relationship between the Fourth Amendment and the subpoena was described by the Supreme Court:

16/ See, United States v. Biswell, 406 U.S. 311 (1972); See v. Seattle, 387 U.S. 541 (1967); Camara v. Municiple Court, 387 U.S. 523 (1967).

17/ See, F.R. Crim. P. 17; F.R. Civil P. 45.

18/ 3 Annals of Congress 490-494 (1792), Accord, McGrain v. Dougherty, 273 U.S. 135 (1927).

19/ A corrollary to the administrative subpoena is an administrative summons. Of specific importance to the present discussion are the authorities of the allowing agencies to subpoena persons and documents.

20/ Boyd v. United States, 116 U.S. 616 (1886) (dicta), Hale v.Hinkle, 201 U.S. 43 (1906) (grand jury subpoena under Fourth Amendment, except that no probable cause be shown).

> "It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. This has been ruled most often perhaps in relation to grand jury investigations, but also frequently in respect to general or statistical investigations authorized by Congress. The requirement of "probable cause, supported by oath or affirmation," literally applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons or things to be seized," also literally applicable to warrants, comes down to supecification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequate or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry." 21/

These bases suffice since the person ordered to produce documents may refuse and require the agency to seek a court order to compel submission. Failure to comply with some administrative summonses or subpoena may be the subject of a criminal sanction,[22/] but this reflects Congress' intent to place the burden of proving (and at least making the initial determination) that the summons or subpoena is invalid on the party. Effectively, response to the terms of a subpoena is consent to a constructive search and seizure.

Voluntarily, given, however, has been construed as fully vitating a warrant.[23/] In the case of third party records the substantial question of who may give consent arises in significantly different terms than other Fourth

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21/ Oklahoma Press Publishing Co. v. Walling, 327 U.S. 168, 207, 208 (1946) (footnotes omitted).

22/ See, e.g. 26 U.S.C. 7210 (1976).

23/ Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Bumper v. North Carolina, 391 U.S. 543 (1968); Amos v. United States, 255 U.S. 313 (1921).

Amendment situations. One specific question also remains in the objective "reasonableness" of the search.

Records in the possession of a third party pose the problem of vicarious consent; consent of the third party for the owner.[24/] While vicarious consent may be given, the right to relief is personal and may not be vicariously asserted.[25/] The only known exception is when a defendant may assert possession of an article, when possession of the article is an element of the offense, in order to gain standing to assert Fourth Amendment rights, evern if actual possession lies in another.[26/] Thus, the question becomes one of standing and as the Supreme Court has noted: "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government."[27/] The right and capacity to object rests only in the holder of the records.

So far as constitutional law is concerned, a person must rely on whomever holds his records to keep them from disclosure; he has no right to do so directly. If any record must be withheld it must be required elsewhere than the Fourth Amendment.

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24/ In regard to places, the law is more definite. Relatives may give consent: Bumper v. North Carolina, supra; Coolidge v. New Hamphsire 403 U.S. 443 (1971). Landlords and hotel clerks cannot consent to searches of a quest's room. Stoner v. California, 376 U.S. 483 (1964); Chapman v. United States, 365 U.S. 610 (1961). See, United States v. Matlock, 415 U.S. 164 (1974) (Mistress can consent).

25/ Compare, Brocon, v. United States, 411 U.S. 223 (1973) with, Mancusi v. De Forte, 392 U.S. 364 (1968)

26/ Jones v. United States, 362 U.S. 257 (1960).

27/ United States v. Miller, 425 U.S. 436, 443 (1976)(discussed infra, at note 86.)

C. The Fifth Amendment Right Against Self-Incrimination

The second Constitutional issue involved in third party records investigations is whether production of incriminatory documents may be required or is privileged under the right against self-incrimination. While the basis for the privilege against self-incrimination is historically less clear than the protection against unreasonable searches and seizures, the limitations of the privilege are much clearer.

A witness cannot be compelled to answer any question which would incriminate himself or the response could provide incriminatory evidence.[28/] However, the privilege will not apply if prosecution is precluded,[29/] to a corporation or association,[30/] or on behalf of another.[31/] Similarly, standardized medical and investigative tests may be properly performed on a defendant without violating the privilege.[32/] Essentially, the privilege is personal, and, most often, testimonial. The singular question here is the compulsion exacted for production of records now in the possession of third parties.

28/ Ullman v. United States, 350 U.S. 422 (1956); Counselman v. Hitchcock, 142 U.S. 547 (1892).

29/ Kastigar v. United States, 406 U.S. 441 (1972) (use immunity under 18 U.S.C. 6001-6005), Murphy v. Waterfront Commission, 378 U.S. 52 (1964) (use immunity principles); Counselman v. Hitchcock, supra (transactional immunity).

30/ George Campbell Painting Corp. v. Ried, 392 U.S. 286 (19688) (corporation); United States v. White, 327 U.S. 694 (1944) (union); Hale v. Henkel, supra, note 20.

31/ Rogers v. United States, 340 U.S. 367 (1951); United States v. LaPera, 443 F.2d 810 (9th Cir., 1970), cert. denied, 404 U.S. 958 (1971) (co-conspirator), Bellis v. United States, 417 U.S. 85 (1974) (dissolved partnership).

32/ Including blood samples, Schmerber v. California, 384 U.S. 757 (1966); fingerprinting, handwriting and voice exemplers, United States v. Dionisio, 410 U.S. 1 (1973); Gilbert v. California, 388 U.S. 263 (1967); and appearance in line-ups, United States v. Wade, 388 U.S. 218 (1967).

The most common example in case law has been criminal tax fraud or delinquency process. Tax enforcement will be a specific subject at a later point, but here three cases specify the constitutional parameters. The issue in Couch v. United States was whether "the taxpayer may invoke her Fifth Amendment privilege against compulsory self-incrimination to prevent the production of her business and tax records in the possession of her accountant."[33/] A summons had been issued to the taxpayer's accountant for all her records and his workpapers; an internal revenue agent had reviewed these documents at the accountant's office with his permission, but, on the taxpayer's request, the accountant had given the papers to her attorney. The first key problem for Couch was that she was not in possession of her papers; the divergence of overship from possession distinguised the facts from much of the previous law.[34/] Petitioner's argument for the privilege to be based on ownership enclusively failed on the basis of "control" of the documents.[35/] The second problem facing Couch was that of "compulsion", for, as in most third party records investigations, the prospective defendant is not required to do anything.[36/]

Bellis v. United States is best known for the proposition that even

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33/ 409 U.S. 322, 323 (1973). "The essential inquiry is whether [petitioner's] proprietary interests further enables her to assert successfuly a privilege against compulsory self-incrimination to bar enforcement of the summons and production of the records, despite to fact that the records no longer remained in her possession." 409 U.S. at 327.

34/ See, United States v. White, supra, note 30 at 699: "[T]he papers and effects which the privilege protects must be the private property of the persons claiming the privilege, or at least in his possession in a purely personal capacity," 322 U.S. at 699. In Couch a variety of documents were required including the accountant's work papers.

35/ 409 U.S. at 330-335.

36/ 409 U.S. at 328-329, 336.

a partnership, no matter how small, with an institutional identity, creates records to which neither partner may assert a privilege against self-incrimination.[37] A difference of opinion within the Court in this case strikes a particular note in third party records: even possession, lawful or not, without uninfringed ownership will be defeated when the Fifth Amendment privilege in asserted.[38]

The court was faced with accountant's papers in the hands of taxpayers' attorneys again in Fisher v. United States.[39] Again the Court held that the papers were not shielded from summons by the Fifth Amendment because they were not his private papers and, although the papers were incriminating, the taxpayer was not compelled to make them incriminating or to incriminate himself.[40] It is the dicta of Fisher which is useful in this study, more so than the repetition of the holding in Couch, for a singular niche in Fourth and Fifth Amendments rights to records in the hands of a third party may exist. Thus a defendant may assert a Fifth Amendment right only if he can show (1) possession, (2) ownership and (3) that the documents are "per se" incriminating.

37/ 417 U.S. 85 (1974)(Bellis rectirates the representatives capacity of the holder as well).

38/ Distinguish, Boyd v. United States, 116 U.S. 616 (1886).

39/ 425 U.S. 391 (1976) (decided the same day as Miller v. United States, supra note 27.

40/ 425 U.S. at 405-414. On Fourth Amendment grounds the taxpayer would fare no better under Miller if a summons or subpoena issued, or if a search warrant issued, no compulsion would be involved: Andresen v. Maryland, 427 U.S. 463 (1976).

D. Attorney-Client Privilege: The Fifth Amendment Diary

In Fisher v. United States, the court specifically reserved the question of whether an attorney may be forced to produce a clients documents which are incriminatory. 41/ The Court's dicta is as follows.

> "Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. ... The purpose of the privilege is to encourage clients to make full disclosures to their attorneys. ... As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. ... This Court and the lower courts have thus uniformly held that preexisting documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal advice. ... The purpose of the privilege requires no broader rule. ... Thus, even absent the attorney-client privileges, clients will not be discouraged from disclosing the documents to the attorney, and their ability to obtain informed legal advice will remain unfettered. It is otherwise if the documents are not obtainable by subpoena duces tecum or summons while in the exclusive possession of the client, for the client will then be reluctant to transfer possession to the lawyer unless the documents are also privileged in the latter's hands." 42/

41/ 425 U.S. at 414

42/ 425 U.S. at 403-404.

This dicta reiterates the narrow rule that papers within a person's possession which fall within the Fifth Amendment privilege are not obtainable from counsel, and this rule had been stated for sometime in the lower courts.[43/] The rule appears to cover two kinds of papers: (1) pre-existing documents exclusively possessed and (2) documents created at the behest of counsel. The former would remain privileged if they had been privileged in the hands of the client.[44/] The latter would intially be privileged as in the attorney-client privilege and may gain the status of the Fifth Amendment privilege if it should include incriminating material.[45/]

This exception would not alter the law; it his been a part of the attorney-client privilege for many years. The sole significance is that, even when the attorney client privilege must give way to extreme, temporary needs, some matters within that privilege will remain beyond reach in the higher standard of the privilege against self-incrimination.

43/ United States v. Osborne, 561 F.2d 1334 (9th Cir., 1977); United States v. Judson, 322 F.2d 460 (9th Cir., 1963); Collon v. United States, 306 F.2d 633 (1962).

44/ This is the diary question which has not been settled. The problem of authority is similar to proving a negative: If a diary (or other record) is not presented to another and that person transmits knowledge of its existence to law enforcement authorities, it cannot be summoned.

45/ United States v. Osborne, supra, note 43; United States v. Judson, supra, note 43.

E. Access to Tax Records: The IRS as an Intra-Governmental Third Party

While the simplest third party records investigation would appear to be that of records in the hands of another governmental agency, production of the most useful record in corruption and organized crime cases, tax records in the hands of the Internal Revenue Service, cannot be compelled. This result is reached only in relation to the returns actually filed with the Commissioner, not to copies retained by the taxpayer or his agents.

1. Agency Acquisition of IRS Tax Records

Section 6103 of the Internal Revenue Code declares tax returns to be public records, but limits inspection of returns, under orders and by rules of the President, to officials of the States charged with tax administration. In the case of corporation, to officials charged with corporate oversight and shareholders of at least 1% of outstanding stock.[44/] Regulations promulgated under this section provided authority for disclosure of particular records to individual establishments within the Federal Government, facilitating investigation within special areas of administration, for a number of years.[45/] Yet there was no general exception for broad-based criminal investigations. A series of amendments, culminating in the Tax Reform Act of 1976 substantially

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44/ Internal Revenue Code of 1954, §6103; August 16, 1954, c. 736, 68A State 753. 26 U.S.C. 6103 (1970, Supp. 1973) as amended. See, also, 26 C.F.R. §301.6103(a) (1977).

45/ 26 C.F.R. 301.6103(a)-101 through 109. (1977) (Committees of Congress, Securities and Exchange Commission, Advisory Commission on Intergovernmental Relations, Department of Commerce, Renegotiation Board, Federal Trade Commission, Board of Governors of the Federal Reserve System and the Treasury Department.

specified access for federal agencies.[46] The recent amendments to section 6103 permit the President to make specific, detailed written requests for individual returns and summary information on persons being considered for President appointments, and permit a broader scope of persons involved in federal tax litigation statutory access to returns.[47] The Tax Reform Act of 1976, Section 1202(e), now Subsection (1) of Section 6103, provides a more narrow basis for third party records investigations to be conducted through tax records. While it necessary to consider these provisions as exceptions to a general nondisclosure policy in the tax laws, this subsection provides the conplex for all executive investigatory agencies to acquire tax information on a person or corporation. Tax return information will be provided to any agency for use in investigating violation of a Federal criminal (non-tax) statute, or in preparing for administrative or judicial proceedings under a criminal statute, when ordered by a Federal District court judge.[48] The head of any Federal agency may apply for such an order, but must show three things before the order can be granted (1) there is reasonable cause to believe that a criminal statute has been violated, (2) the information sought has probative value to the investigation of that violation and (3) the information can not reasonably be obtained from another source, or that the return information is the most probative evidence of the criminal

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46/ See, Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1667, October 4, 1976; Title XII, §1202.

47/ 26 U.S.C. 6103(g), (h). Subsection (g)(2) requires the Secretary of the Treasury to notify any person on whom he has provided summary information of that fact within 3 days of doing so. Subsection (h)(2) brings within the statute the necessary practice of providing tax returns to the trial attorneys within the Justice Department's Tax Division, the U.S. Attorneys, or other attorneys prosecuting tax cases.

48/ 26 U.S.C. 6103(i)(1)(A). (1970, Supp. 1977).

act.[49] The Secretary of the Treasury is not required to disclose the information if he certifies to the court that disclosure would reveal a confidential source or seriously impair a civil or criminal tax investigation.[50] This procedure is far more demanding than the requirements of obtaining a subpoena or subpoena duces tecum, and was specifically designed to limit access more effectively to specifically articulable needs.[51] The ability of the agencies to investigate on the basis of third party records under these restrictions is currently being tested, but legal challenges are not yet recorded.

2. IRS Acquisition of Third Party Records

An additional problem, and one which will recur throughout a discussion of third party records, revolves on whether the subject of the records and the investigation should be notified and the extent of his legal responses. This represents the other side of the coin: The IRS means of acquisition of records from a third party as distinct from the IRS being the third party from whom records are sought. The means by which the IRS acquires information will have an impact on whether it can disclose information to other agencies.

The efficient operation of the revenue collection system is specially important to any government, and Congress has granted the IRS additional powers in order to insure that efficient operation. Most important of these is the

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49/ 26 U.S.C. 6103(i)(1)(B). This includes the Deputy and Assistant Attorneys General.

50/ Id.

51/ The Tax Reform Act of 1976 increased the number of agencies with potential access, limited the scope of their access and added the more rigorous procedure. Additionally, the Act increased the offense of unauthorized disclosure to a felony with a potential sentence of five years and a $5,000 fine. See, 26 U.S.C. 7213, 18 U.S.C. 1905 (1970, Supp. 1976).

authority to summon a taxpayer, or any person having custody of records pertaining to a taxpayer's tax liability, for any of four purposes: "[1] ascertaining the correctness of any return, [2] making a return where none has been made, [3] determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transfereee or fiduciary of any person in respect to any internal revenue tax, or [4] collecting any such liability."[52/] It was this type of administrative summons which triggerd the court proceedings in Couch, Bellis, and Fisher.[53/] The breadth of inspection and the boilerplate nature of enforcement make the administrative summons a powerful tool for investigations within the four purposes. However, the courts have construed these purposes narrowly in order to insure that the administrative summons is not used for a solely criminal investigation.[54/] This means that the summons may be issued and enforced if issued in good faith before a recommendation of criminal prosecution is fowarded to the Justice Department, or if there remains a secondary civil purpose to a criminal investigation.[55/] The reverse of this procedure, the suggestion of a tax audit by the Justice Department, appears to be impermissable.[56/]

52/ 26 U.S.C. 7603 (1970)

53/ Supra, notes

54/ Donaldson v. United States, 400 U.S. 517 (1971) (See, cases cited at n. 13): Reisman v. Caplan 375 U.S. 440 (1964); United States v. Zack, 521 F.2d 1366 9th Cir., 1975); United States v. Held, 435 F.2d 1361 (6th Cir., 1970), cert. denied, 401 U.S. 1010 (1971).

55/ Donaldson, supra; Zack, supra; Held, supra.

56/ See, United States v. Tweel, 550 F.2d 297 (5th Cir., 1977). See, also, United States v. Lafko, 520 F.2d 622 (3rd. Cir., 1975).

When a summons is issued to a third-party the subject of the summons, traditionally, was not formally notified. Should the subject taxpayer be aware of the summons, the Supreme Court has held in Donaldson v. United States, there is no statutory right, or interest sufficient under the Federal Rules of Civil Procedure to justify intervention.[57/] Congress reversed the holding of Donaldson with Section 1205 of the Tax Reform Act of 1976.[58/] Section 1205(a) requires the IRS to notify any taxpayer of the fact that a summons has issued to a third party recordkeeper requiring production of books and papers pertaining to the taxpayer within three days of service of the summons and not less than fourteen days before the records are to be inspected.[59/] Section 1205(b) grants any person who has a right to notice under section 1205(a) the additional right to intervene in proceedings to enforce a summons and the right to stay compliance with the summons by ordering the person summoned not to comply and serving a copy of that order to the IRS.[60/]

57/ Supra, note 54. F.R. Civ. P. 24(a)(2), providing for permissive intervention, was at issue. (Part VI).

58/ Supra, note 46. 26 U.S.C. 7609(a)(1977).

59/ Third party record keepers are defined to include banks, savings and loans, consumer reporting agencies, other extenders of credit, stocks and securities brokers, attorneys and accountants.

60/ Supra, note 46. 26 U.S.C. 7609(b)(1977). This section also prohibite the IRS from examining any records covered by the summons. It would appear that once the taxpayer has give notice of stay and intervention the burden falls on the IRS to comply. 26 U.S.C. 7609(d)(1977). The period of time, following intervention until the issue of the summons is decided is excepted from the running of the statute of limitation. 26 U.S.C. 7609(e)(1977). In case of a "John Doe" summons a court proceding must be held in which the IRS must show (1) an ascertainable person or group, (2) a reasonable basis to believe there has been a violation and (3) no readily available other source. 26 U.S.C. 7609(f)(1977).

3. IRS Discretion to Disclose

The administrative summons was widely used for acquiring third party records before Congress enacted the Tax Reform Act of 1976. How much the provisions of Section 1205 have operationally restricted the IRS is still subject to speculation. Additionally, the effect of the new format and added restrictions on access to IRS tax returns under amendments in 1974 and 1975, and the Tax Reform Act, cannot be ascertained, but, if these provisions are legally effective and enforced, the agencies should have very limited access to tax records for non-tax investigations. Somewhere between these two propositions is the subliminal problem of non-tax criminal investigations leading to a referral to the IRS for administrative tax review, although there is an inherent inference of a criminal allegation.[61/] This trilogy leads to one final problem for agency acquisition of tax records for nontax criminal investigations: the IRS discretion to certify that disclosure would "seriously impair a civil or criminal tax investigation."[62/]

The restrictions on disclosure of tax information is part of a legislative scheme designed to insulate the IRS tax operations and the taxpayers from political influence and other misuse of IRS process in other criminal investigations.[63/] Previous to the Tax Reform Act, investigators were often counseled to expect little or no information from the IRS; that, in effect, investigations with the IRS were a one-way street. Congress has now made this counsel a matter

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61/ See, Tweel, supra, note 56.

62/ Tax Reform Act of 1976 1202(a)(1); supra, note 46; 26 U.S.C. 6103(i)(1)(B) (1977).

63/ Sen. Rep. 94-938, 94th Cong., 2d. Sess. 326-331; 1976 U.S. Code, Cong. and Admin. News 3756-3761.

of law to the extent ordered by the courts. With this mandate, the IRS has a permium on non-disclosure in order to protect its own civil and administrative options. It would appear imprudent for the IRS to given information to ther investigatory agencies when a return of information developed by that agency may be legally useless for further enforcement of the tax laws. The complex legislation on IRS tax information acquisition and disclosure now appears to counsel a burden on third party records investigations which can be overcome only when the IRS has no expectation of continuing tax procedings in that matter. Until this becomes a matter of judicial sanction however, interagency communications probably will continue.

F. Intra-Governmental Records

Records, other than IRS tax records, already in the possession of an agency of the Federal Government provide a special source of information for criminal investigations. As sources, these agencies include the obvious Securities and Exchange Commission, Federal Trade Commission, or the Interstate Commerce Commission, to the more obscure Veterans Administration, Defense Intelligence Agency, or the Federal Election Commission. The ability of an agency to acquire records from other agencies in the course of a criminal investigation may be the difference between prosecution and non-prosecution.

1. The Privacy Act of 1974

General consideration of an individual's right to privacy were all that might compel an agency not to disclose its records on an individual to another agency. Wide differences as to what that meant and perceived abuses at both ends of the scale from permissiveness to secretiveness lead Congress to enacted a series of laws since 1974 setting out some limits and requirements of disclosability.64/ The Privacy Act of 1974 is important in the context of third party records in its restrictions on disclosure and requirements of accuracy. The Act proceeds from a premise of nondisclosure of any record without the permission of the person who is the subject of that record, to an exception permitting disclosure:

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64/ Of particular interest here is the Privacy Act of 1974, Pub. L. 93-579, 3, 83 Stat. 1897, December 31, 1974, as amended, Pub. L. 94-183, 2, 89 Stat. 1057, December 31, 1975; 5 U.S.C. 552a(1977). See also, Freedom of Information Act, 5 U.S.C. 552 (1977); Tax Reform Act of 1976, supra, note 46-51 and accompanying text.

> "To an agency ... of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request ... specifying the particular portion desired and the law enforcement activity for which the record is sought.65/

The ability of law enforcement agencies to gather information is not impaired so long as the formal request is made. This exception covers disclosure by one investigating agency to another, such as from the Federal Trade Commission to the Securities and Exchange Commission. The reference procedure followed by many agencies communicating recommendations for prosecution by the Justice Department falls within the definition and exception for "routine use".66/ While the criminal investigation agencies have only a formal role in the administration of the Privacy Act as recipients, the same agencies have significant operative duties as disclosers of information.

Of primary importance to a discloser under the Privacy Act is accuracy in the records disclosed. The Privacy Act requires each agency to maintain only information which is relevant and necessary to accomplish the agency's purposes, collect its information to the greatest extent practical from the individual, maintain its records with a degree of accuracy, relevance, timeliness and completeness as reasonably necessary to assure fairness and make reasonable efforts to notify the individual "when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record".67/ Furthermore, the Act requires each agency to disclose all

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65/ 5 U.S.C. 552a(b)(F)

66/ 5 U.S.C. 552a(a)(F), (b)(3). See e.g. Harper v. United States, 423 F. Supp. 192 (D.C.S.C., 1976).

67/ 5 U.S.C. 552a(e)(1),(2),(5) and (8). These are only requirements which are of interest in this study. Agency regulations, Federal Register Reporting and notices in acquiring information are omitted.

all records pertaining to an individual to that individual, and to permit the individual to request amendment of that record and to appeal the determination on his request.[68/] However, agencies may promulgate regulations exempting records from all of these requirements if the record is maintained by a component whose principle function pertains to enforcement of the criminal laws and which consists of information compiled for that function or between the individual's arrest and release from supervision.[69/] Thus, the components of the Federal government which have a primary purpose in criminal law enforce- are exempt from the Act's requirements of agencies as both recipients and disclosers.

Components of an agency which do not have this primary function, are required to give access, accept proposed correctional amendments and update receipients an amendments and corrections. A seminal question is what agencies or components of agencies have such a primary function, but Congress did not provide an answer.[70/] This ambiguity poses hazards for any agency which considers itself "borderline". While it would be conceded that the Criminal Division of the Justice Department or the Intelligence Division of the Internal Revenue Service have primarily criminal law enforcement functions, the real question

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68/ 5 U.S.C. 552a(d). This section does not permit an individual access to materials in preparation for a civil action.

69/ 5 U.S.C. 552a(j)(2).

70/ This question includes the degree of organization and record breakdown within an agency. For example, two attorneys in the Appellate Section, Tax Division of the Justice Department do almost exclusively criminal appeals while the rest of the Section does civil appeals. These two attorneys obviously have a primary function in criminal law enforcement while rest of the Section does not; organizationally and functionally as recordkeepers there is no difference. The same holds true of all agencies such as a segment of HEW's Office of Inspector General; a segment of IRS's Office of Inspection Services

revolves around components such as the enforcement Division of the Federal Trade Commission, the fraud unit at the Securities and Exchange Commission, or the Food and Drug Division of HEW's Office of General Counsel. Should an agency incorrectly believe its "primary functions" include criminal law enforcement and, therefore, not permit access and proposal corrections to the individual, it may impugn the admissability of a record referred to a criminal investigatory agency which results in prosecution. Conversely, if an agency mistakenly fails to notify an individual of disclosure because it believes the receipient to be a criminal investigatory agency, an assertion of rights by the individual may impugn the admissability of the documents if further, properly, referred to a criminal investigatory agency and prosecution.

In terms of the individual, the Act does not require criminal investigatory agencies to account for disclosures of information on the individual to that individual.[71/] At the same time, with no access to records, on individual's disputation of the record need not be reported to the agencies to whom a record has been disclosed.[72/] Thus, the Act itself does not place any new premium on the accuracy of criminal investigatory files. Other than agencies on the borderline of criminal investigatory functions, the Act does not significantly impair the exchange of information.

71/ 5 U.S.C. 552a(c)(3)

72/ 5 U.S.C. 552a(b)(4).

2. Federal Bureau of Investigation Records

The organizational proximity of the FBI to federal prosecutions -- both as arms of the Justice Department -- greatly simplifies the use of records transfers between them. However, a special standard of care has also been formulated in recent years for the maintenance and dissemination of current records and investigative reports.

The FBI is authorized and directed to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records".[73/] While the statute says nothing about the accuracy or completeness of each file on and individual, the courts have required a degree of accuracy and completeness before use or dissemination.[74/] These requirements are important to the reliance of other agencies on such preliminary records as criminal histories and fingerprints, but the courts have not asserted any requirements over FBI investigative reports or summaries. There appear to be no limitations on disclosure, access, or notifications if minimum accuracy standards are maintained.

In this instance concern focuses solely on the FBI's "criminal identification" files submitted by police departments and other law enforcement agencies concurrent to an arrest, not general identification files developed from federal employment or other non-criminal sources. Thus, the cases arise in the context of expungement. Initially the FBI was required to expunge information from the

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73/ 28 U.S.C. 535 (1970, Supp. 1976).

74/ Procedural requirements are involved since this set of requirements would not rest on a statutory base. See, e.g. Crow v. Kelly, 512 F.2d 752 (8th Cir. 1975) (mandamus).

criminal identification records when the submitting agency later reported facts which disputed or reversed the first filing.[75] Dicta has extended this rule to a duty of reasonable care to avoid injury to persons through the dissemination of inaccurate information.[76] Beyond this point the law has not formally extended, although administration practice may.[77] Again, in the case of FBI records, and in agency records under the Privacy Act, some premium is being placed on accuracy. The effectiveness of this premium remains questionable.

75/ Menard v. Saxbe, 162 U.S. App. D.C. 204, 498 F. 2d 1017 (1974)

76/ Tarlton v. Saxbe, 165 U.S. App. D.C. 293, 507 F.2d 1116 (1977). See also, Utz v. Cullinane, 172 U.S. App. D.C. 67, 520 F.2d 467 (1975)(District of Columbia "Duncan Ordinance"; standard of care).

77/ The caseload of expungements has increased in recent years, as has the the complexity of the courts authority to order exchangement. See, e.g. Morrow v. District of Columbus, 135 U.S. App. D.C. 160, 435 F. 2d 728, on remand, In Re Alexander, 259 A.2d 592 (1970). Contra, Rogers v. Slaughter, 469 F.2d 1084 (5th Cir., 1972); Herschil v. Dyra, 365 F.2d, 17 (7th Cir., 1966) cert. denied 385 U.S. 973 (1966). Cf. Wilson v. Webster, 467 F.2d 1282 (9th Cir., 1972).

G. Private Records Required to be Maintained by Statute or Regulation

Beyond the confines of records kept by agencies of the government an even larger universe of records exists in the hands of private parties pertaining to other private parties which are required to be maintained by statute or implementing regulation. These records provide more fertile ground for criminal, civil or regulatory investigations because the extensiveness of these required records is only rarely understood by the person subject to investigation. For example, many organized crime figures have been known to purchase cashiers checks or money orders, issued in blank if possible, in the false belief that such drafts are not traceable. Another poignant example was the speed with which Texas and Federal authorities were able to trace the ownership of the weapon in the Kennedy assassination through voluntarily, but now mandatorily, maintained records.[78/]

In this section, such mandated records as bank deposits, securities transfers, firearms and explosives transfers and political campaign reports will be considered. While no attempt is made at being exhaustive in this field, an attempt has been made to balance the types of reporting to the field of potential sources of investigation material from third parties. One particular thread connecting many of these records should be noted at the beginning - money. As every other aspect of life depends upon a cash flow - in currency, drafts,

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78/ Supra, notes 1-2 and accompanying text.

checks, notes or other representative form - so, too, must rackerteering, bribery, white collar, computer or any other complex criminal scheme in which the Federal Government has jurisdiction.[79/]

1. Bank Records

Bank records are the singularly most useful third party records which might be acquired for criminal investigative purposes. "Congress finds that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax and regulatory investigations and proceedings."[80/] On this predicate, Congress has extended mandatory record-keeping and reporting functions over a variety of financial institutions. While this section will be limited to banking, there are significant repercussions in other areas of finance, including securities markets and transfers. Third party records investigations utilizing bank records can not ignore either federal, state or foreign law.

79/ Note that even a criminal tax case need not be based on a "net worth" or "bank deposits" method of proof, but can be wholly made out through recorded expenditures; i.e. cash payment for everything: hotels, restaurants, airline tickets, and special occasions are examples of single shot major expenditures which generate voluntary records which will be kept by the third party for tax purposes. Patterned expenditures to the corner supermarket or service station also provide testimony although not documents.

80/ U.S.C. 1951(a); 31 U.S.C. 1052(e).

a. Federal: bank secrecy act of 1970.

In response to growing complexity in Federal criminal prosecutions and a countervailing unavailability of foreign and domestic bank records, Congress passed what is colloquially known as the Bank Secrecy Act of 1970.[81] The Bank Secrecy Act authorizes the Secretary of the Treasury to promulgate regulations mandating records to be maintained and reported by federally insured banks, state insured banks and uninsured banks.[82] The Act requires reproduction of each check or other instrument and signature cards for each person who has an account with that bank, to the extent that the Secretary demands by regulation or order.[83] The Act also requires that reports on specific types of transactions be made to the Secretary under regulations that he promulgated, and, in any even, all imports of currency or commerical instruments in excess of $5000.[84] This statutory scheme, and regulations applicable under it in 1974, weathered a broad based constitutional attack by banks, an association of banks and customers in California Bankers Association v. Schultz.[85]

81/ Pub. L. 91-508, 84 Stat. 1114 (October 26, 1970); 12 U.S.C §§1829b, 1730d, 1951-1959; 31 U.S.C. §§1051 - 1122 (1970, Supp. 1976).

82/ 12 U.S.C. 1829b, 1953. The Act also covers such other financial institutions as securities brokers and dealers, currency exchanges, insurers, travel agencies or other remitters, insurers, redeemers or cashiers of checks, money orders or other instruments. For the time being, discussion will be confined to colloquially known "banks".

83/ 12 U.S.C. 1829b(c), (d); 1953(a).

84/ 31 U.S.C. 1081 - 1105

85/ 416 U.S. 21 (1974). The regulations in California Bankers Association are not substantially different from those in force at the present time.

More recently, the Court held in United States v. Miller, that a criminal defendant lacks standing to object to a defective grand jury subpoena duces tecum issued to banks for the production of records of his account that the banks maintained under the Secrecy Act.[86/]

The caveat of the 'extent to which the Secretary requires' is important since the Act makes no differentiation and could require reproduction and maintenance of all instruments. The Secretary's regulations are significantly less demanding and focus on those records with the "high degree of usefulness". The regulations require maintenance of records on all extensions of credit in excess of $5,000 unless secured by realty and all documents related to transactions involving more than 10,000.[87/] Additionally the Secretary requires records be maintained of each signature authority over any account, statement or ledger cards, and each check, clear draft or money order.[88/] Expressly excluded from the checks and drafts requirements are those accounts which issue over 100 instruments per month or at a time which are dividend, payroll, employee benefit, insurance claim, medical benefit and pension or annuity checks.[89/]

86/ 425 U.S. 435 (1976).

87/ 31 C.F.R. 103.33 (1977).

88/ 31 C.F.R. 103.34 (1977).

89/ 31 C.F.R. 103.34(b)(c) (1977).

Also exempted are checks or drafts drawn by securities brokers and dealers, or on governmental agencies, fiduciary accounts (i.e. trust) or other banks or financial institutions.[90/] The specific requirements embodied in these regulations permit the normal course of small business to operate without imposing duties on banks; at the same time, steady volume customers are exempted. Thus the regulations attempt to ferret out inordinately large or singular transactions which are most likely to implicate criminal activity, or tax or regulatory violations. The regulations also make clear the relative importance of controlling foreign transfers of funds (over $5,000) since none of the exemptions apply and each individual must maintain corrollary records.[91/] The reporting requirements under the implementing regulations are also less cumbersome than could be demanded under the Act. Banks are required to report all transactions on transfers involving more than $10,000, or its equivalent in foreign currency, within 45 days of the transaction.[92/] This requirement does not apply to transactions "with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned."[93/]

90/ Id. Securites brokers and dealer are controlled by the Securities and Exchange Act of 1934. See, infra, notes 118-132, and accompanying text. See, also, 31 C.F.R. 103.35 (1977).

91/ 31 C.F.R. 103.22; 103.24; 103.32.

92/ 31 C.F.R. 103.22; 103.25. Report is to be made to the Commissioner of Internal Revenue.

93/ 31 C.F.R. 103.22(b)(3). A list of such customers is required. Id. Subsection (b)(2) exempts inter-bank business. These transactions are separately governable and do not have a high degree of usefulness in investigations.

The regulations point again to requiring reporting those transactions which are a strong indicia of abnormal, and perhaps unlawful, activity. Special requirements for the reporting of import and export of currency or instruments exceeding $5,000 are levied on individuals, with banks excepted, as well as interests or signatory authority in foreign bank accounts.[94/] These requirements must be considered in light of the record maintenance requirements under the regulations as providing a constant record of any such large sums of money or instruments.[95/]

Much of the Secretary's authority under the Act has been delegated to agencies within the Treasury Department and to independent agencies with special expertise in an area.[96/] These reports would be third party records only to agencies other than the Secretary and his designees; the Act provides for disclosure to other agencies when requested under regulation of the Secretary.[97/] The regulations under this section require the head of a requesting agency to specify: 1) the particular information desired, 2) the criminal, tax or regulatory investigation or proceeding to which the investigation or proceeding to which the information pertains, and 3) the agency's need.[98/] Additionally, agencies

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94/ 31 C.F.R. 103.23, 103.24. See, especially, 31 U.S.C. 1141-1143 (1970, Supp. 1976); 31 C.F.R. 128.1 et seq. 1976).

95/ See, 31 C.F.R. 103.33, 103.34. Effectively the government can trace any such sums until they are broken up, making crime inefficient at worst.

96/ 31 C.F.R. 103.46. For example the securities brokers and dealers provisions are enforced by the SEC; the export-import provisions are enforced by the Commissioner of Customs.

97/ 31 U.S.C. 1061.

98/ 31 C.F.R. 103.43.

can not circumvent the Secretary and acquire information from the banks directly from records maintained or reports, and using the Secretary's authority, except by resort to legal process.[99] Conflicts in this process are avoided by conforming regulations within the agencies with delegated authority.[100]

It is essential at this point to look at actual bank practices. First, many of the records which the Act requires to be maintained were previously being maintained by many, but by no means all, banks as a matter of course in the event their activities or actions were questioned. For part of the commercial banking and private banking world only the reporting requirements were new.[101]

b. State: privacy, notification and banking practice.

Several states have more restrictive rules on disclosure of bank records and this raised a number of problems within the principles of federalism. It is first necessary to briefly consider the concept of preemption. Where federal and state police powers have conflicted, the Supreme Court has started with the assumption that the police powers of a state were not superseded by the Federal Government "unless that was the clear and manifest purpose of Congress."[102] The review necessarily entails a look beyond any unclear act

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99/ 31 C.F.R. 103.51 Cf. U.S. Attorneys' Manual 9-2.165 (January 10, 1978) (Grand jury subpoenas for financial records).

100/ See, e.g. 15 U.S.C. 200.41 (1977).

101/ Cf. California Bankers Association v. Schultz, supra, note 85, at 41-54.

102/ Ray v. Atlantic Richfield Co., - U.S. -, 46 U.S.L.@. 42)(No. 76-930, March 6, 1978); Jones v. Rath Packing Co., 430 U.S. 519 (1977); Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 230 (1977).

into the legislative history for indicia of legislative intent. But even if the Act does not completely preempt state action in an area, where an actual conflict exists, where compliance with both Federal and State statute is impossible, the Supremacy Clause requires the State statute to give way.[103] In this light the Federal Bank Secrecy Act of 1970 and various state laws can be hypothetically analyzed for potential conflict.

First, at least four states - Alaska, California, Illinois and Maryland - require third parties utilize legal process to gain access to bank records.[104] The Federal Bank Secrecy Act requires the Secretary of the Treasury to insure compliance, and this, necessarily, extends only to documents maintained under his regulations which are not required to be reported. Compliance inspection would conflict with the state requirement for judicial process, but not with administrative process. At any rate, the Secretary would gain access to any such records under his legislative mandate despite state enactment which are more restrictive.[105] Other federal agencies are required to utilize legal

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103/ Id.

104/ See, e.g. 1976 Alaska Sess. Laws 06.05.175; Cal. Govt. Code §§7460 et seq. (1977); Pub. Acts 79-1493, 79-1494, 1976 Ill. Legis. Ser.; Md. Ana. Code Art. 11, §224-27 (1976), respectively. These statutes are limited to state and local operations, but this is not necessarily required. Analysis will proceed on the "worst case" assumption that the states made these statute apply to all investigation with their geographic borders.

105/ 31 C.F.R. 103.51 indicates the Secretary's restrictive view of his authority:

> "Except or provided in §§103.34(a)(i), [signature cards] and 103.35(a)(i)[securities brokers' customer amount identification], and except for the purpose of assuring compliance with the recordkeeping and reporting requirements of this part, this part does not authorize the Secretary or any other person to inspect or review the records required to maintained.... Other inspection, review or access to such records is governed by applicable law."

process in any event and court process, federal or state, would appear to suffice. Whether administration process of a federal agency would suffice to meet state law requirements is a question subject to debate.

Secondly, three of these statute - California, Illinois, and Maryland - require some form of notification to the person whose transaction records are to be reviewed.[106] In California notification is not required if access is gained by use of a search warrant,[107] while in Illinois and Maryland notification can be waived by a court.[108]

Finally, following from notification, California permits the party to intervene to quash the subpoena summons or warrant.[109] Whether this would be true in a case of federal process through a state court, or vice versa, is a question of interpretation which lies somewhere between the California state practice and the rule in Miller. A contrary state rule hypothetical is apparent where notification to a customer of impending review by the government is prohibited. This appears to be the case in several states.[110]

This leaves two added propositions to be touched upon in passing - the common law and optional notifications at the bank's discretion or by contract with

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106/ Supra, note 104

107/ Id. Notification then becomes an option to the bank.

108/ Id.

109/ Supra, note 104

110/ See e.g., Fla. Stat. Ann. 659.062 (1976); 1975 Iowa Acts, ch. 240, §536; Kansas Stats. §17-5568 -17-5569 (1977); 1975 Oregon Laws, Chap. 193, §9-10.

depositor. Several states have judicially created restraints by placing a premium on notification on an implied contract right.[111] Banks do not make a practice of discretionary notification of third party records investigations, nor is such a provision common to depository, debtor-creditor relationships. This is not say, however, that a bank officer or employee may not inform a particular client, for whatever reason, that his or her bank transaction records have been demanded by subpoena. Federal law does not prohibit this communication short of criminal conspiracy to defraud or obstruct justice; and it is doubtful that an agency of the government - excepting, perhaps, a federal grand jury - could require silence.

c. International bank secrecy.

Bank secrecy laws of several foreign nations pose special problem for third party records investigations.[112] While individuals are required to report interests or signatory authority over foreign bank accounts, and banks and others are required to report any significant international monetary transactions,[113] as has already been noted, if the original violations were profitable enough to warrant removal of the proceeds to another country, there is little deterrent value in the Bank Secrecy Act. Special examples of restraints are available the secret, numbered bank accounts of Switzerland and the Bahamas;

111/ eg. In Re Addonizio, 53 N.J. 107, 248 A.2d 531 (1968); Peterson v. Idaho First National Bank, 83 Idaho 578, 367 P.2d 284 (1961). Whether these, and other cases, raise an "impairment" of contract question under the Constitution, if applied Federally, is speculative.

112/ While foreign relations are normally a matter for the Executive in the first instance this section is offered because of the import these laws have on the ability to investigate criminal, tax and regulatory violations.

113/ Supra, note 94, and accompanying text.

such matters are so sensitive that investigators and prosecutors are cautioned not to contact these countries without the authorization of the Justice Department.[114] Generally, third party records searchers are impossible to effectuate unless the foreign bank is a subsidiary of an American corporation or has a branch office in this country.[115] Notwithstanding these foreign bank secrecy acts, and criminal penalties for supplying records or testifying about banking records or operations, the United States has utilized the grand jury process, with its protective secrecy, to direct testimony from alien bank officials found within its jurisdiction.[116] Despite these impediments, the Government continues to press investigations into criminal, tax and regulatory violations through foreign bank records[117]

2. Securities Dealers and Brokers.

Securities dealers and brokers, including underwriters, are subject to records maintenance and reporting requirements under the Securities and Exchange Act of 1934[118] and other laws, including the Bank Secrecy Act of

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114/ United States Attorneys Manual 9-2.153 (January 10, 1977).

115/ I.e. this is a question of in personam jurisdiction.

116/ See, e.g. In Re Grand Jury Proceedings, United States v. Field, 532 F.2d 404 (5th Cir. 1976), rehearing and rehearing en banc have denied 535 F.2d 659, 660 (1976), cert denied, U.S. (1976).

117/ See, Oversight hearings into the Operations of the IRS (Operation Tradewinds Project Haven and the Narcotics Traffickers Tax Program), Committee on Government Operations, U.S. Senate, 94th Cong. 1st Sess. October 6, November 4 an 11, 1975 (Committee Print).

118/ 15 U.S.C. §78q(a)-(c) (1976). See also, 15 U.S.C §77f (1976) (Securities Act of 1933); 15 U.S.C. §§80a-8, 80a-29 - 80a-34 (1976) (Investment Company Act of 1940); 15 U.S.C. §§80b-4, 80b-10 (1976) (Investment Advisors Act of 1940); 15. U.S.C. 79e(1976) (Public Utility Holding Company Act of 1935).

1970.[119] While this area of law is specifically controlling of public ownership of corporate securities from issuance through transfer, control of frauds and insider trading, to dissolution, it is important to other investigatory agencies as a means for tracking illicit capital.

The Securities and Exchange Commission requires the registration of securities and prospectuses on the initial issuance of most securities of public corporations.[120] Periodic reports are required to keep the Commission up to date on transactions of a security, especially whenever five percent of equitable ownership in controlled by one person or a group of people acting in consert.[121] Registration is required of exchanges, brokers and dealers and, through the securities, the identities of controlling interests.[122] Since it is the mandate of the Commission to protect the investor from fraud and manipulation through misrepresentation, the exchanges brokers and dealers were required to maintain entensive transaction and accounting records which may be examined by the Commission to insure compliance.[123] Investment companies and advisors are required to maintain and report substantially the same information as dealers,

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119/ Supra, note 81, at 31 U.S.C. (1052(e)(7)-(q) as Implemented 31 C.F.R. 103.35 (1977).

120/ 15 U.S.C. §§77f - 77h, 77j. (1976). Exemptions includes securites guaranteed by the United States; securities of governmental enties; notes, bills and bankers acceptances; special pension and annuity securities; and bankruptcy receiver's securities, among other. 15 U.S.C. 77e.

121/ 15 U.S.C. 78m(d) (1976).

122/ 15 U.S.C. 78f, 781, 78o, and 78ee (1976).

123/ 15 U.S.C. §78q. (1976). To the extent applicable, these records are also reviewable by the Board of governors of the Federal Reserve System in fulfilling their duties.

brokers, exchanges and issurers by reference, but additional auditing and accounting requirements are also imposed.[124/] These requirements are not preemptory of state law enforcement.[125/]

The various securities laws manifest an intent that securities issuance and transfer be accomplished within the public's sight. Hence the SEC is authorized to disclose to the public a wide variety of reports submitted to it by issuers, exchanges, brokers, dealers and holding and investment companies,[126/] with the single exception of trade secrets related to patents and processes.[127/]

Nothing in the laws administered by the SEC prohibits or impedes the SEC from disclosing its records to other investigatory agencies, regulations promulgated by the SEC require an employees served with legal process for obtaining such records to refer the matter to the Commission.[128/] It is apparent from these regulations that the Commission acceeds to requests from criminal law enforcement authorities readily and requests notification

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124/ 15 U.S.C. §§80a-29 - 80a-31; 80b-4 (1976). 17 C.F.R. 240.15610-6 240, 17a1-19 (1977).

125/ E.g. 15 U.S.C. 77r; 80b-18a (1976)

126/ 15 U.S.C.§§178x; 79x; 80a-44; 80b-10 (1976). Bai see; 17 C.F.R. 240.0-6 (1977).

127/ Cf. 5 U.S.C. 552(b)(4) (1976).

128/ 17 C.F.R. 200.735-3(d); 200.410(c); 200.80 (1976).

for approval of civil actions as a matter of protecting their own jurisdiction.

Under regulations implementing the Bank Secrecy Act of 1970, brokers and dealers are required to ascertain taxpayer identification numbers for all customers and maintain with these identifications all records granting signature or trading authority.[129] Like banks, brokers and dealers are required to maintain records of receipt and remittance of all funds of $10,000 or more.[130] To an extend, these regulations of the Secretary of the Treasury require the same records as required by the SEC. To the extent of this duplicate requirement, the agencies may apply to the authority offering easiest access for the records.

An elemental difference exists at this junction which demands special attention. Records maintained by a bank under the Bank Secrecy Act, and especially reports submitted under that Act, appear to escape the strictures of the Privacy Act. Under the Privacy Act, as already noted, a file on a "person" cannot be transferred from its originator agency to a requesting agency without notice to the subject.[131] Although the records and reports are on a particular individual's transactions with a bank, it is the bank which is required to make reports and maintain the records, and a question arises whether the individual customer has a right to notice and correction.[132]

129/ 31 C.F.R. 103.35(a) (1977).

130/ 31 C.F.R. 103.35(b)(3), (4) (1976).

131/ Supra, notes 69-70, and accompanying text.

132/ The customer may well be a "fourth" party in the transfer of agency records in this case. Note however, that the exemption applicable to a criminal law enforcement requestor is more likely in this case. See, supra, notes 64-68, and accompanying text.

In the case of reports filed by the stock brokers and dealers under regulations of the the SEC or the Secretary of the Treasury, the intermediary nature of the respondent may not be entirely clear. These records and reports often provide a more conspiratory picture of the broker or dealer than would a bank record. Whether a customer must be afforded notice and correction under the Privacy Act is an even more clouded issue.

3. Federal Elections Campaigns

The Federal election laws provide another illustration of specialized regulatory activity which requires records important to other law enforcement activities. By definition the records required under the Federal Election Campaign Act[133/] are primarily of use in the public integrity area, but the same records may indicate illegal activity in other areas, especially those related to lobbying in the political process - labor unions, associations and corporations.

The FECA requires submission of detailed contribution and expenditure reports to the Federal Elections Commissions of several types: (pre-election, post-election, annual and quarterly) and apply to general, special, primary and run-off elections.[134/] Included in these reports are data on available cash, identity and amount of all contributors and expenditures in excess of $100, proceeds from sales, loans, salaries and expenses, summaries of contributions of less than $100 and petty cash expenditures and outstanding debts and

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133/ 2 U.S.C. 434 (1976). See, Buckley v. Valeo, 424 U.S. 1 (197)

134/ 2 U.S.C. 434(a), 432(1976).

obligations.[135] Precise accounting and recordkeeping requirements are manifest in the Act and provision is made for examinations and audits.[136] Unlike bank records, an only partially like securities brokers and dealers' records, under the FECA are required from the individual who is most likely the subject of investigation.

The FECA does not inhibit third-party agency access to election campaign records and reports. Neither the Act or agency regulations appear to require judicial process to gain access. The Privacy Act, however, appears to directly control this type of request.[137] The relative youth of the Commission curtails this analysis through lack of reported experience in the area. Conversely, the lack of policy on the subject points up the need for broader policy decision on financial third party records.

4. Firearms Control

Outside the area of financial records, one area stands out among records required to be maintained by the government - registration and transactions in firearms, explosives and other destructive devices. As has already been noted, commerical records tracing the commerce of the rifle found at the Texas School Book Depository were crucial to linking Oswald to the Kennedy

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135/ 2 U.S.C. 434(b).

136/ 2 U.S.C. 432(c), 437d(a)(3),(10), 437a (1976). Section 437b requires all contributions and expenditures be recorded through a depository account with a national or state bank, thus dovetailing with maintenance and reporting requirements of the Bank Secrecy Act of 1970. See, supra, notes 131-132, and accompany text.

137/ See, 11 C.F.R. 1.1. - 1.14 (1977).

assassination.[138] Since the assassination, state and federal regulation has displaced the commercial practices of firearms dealers by enforcing a standard which many dealers had previously maintained but which many had flagrently ignored.[139] Political pressures have had significant impact on the development of gun control legislation, and both federal and state law must be reviewed since the federal law has not preempted state action.

a. Federal statutes.

In the Gun Control Act of 1968, as amended, Congress instituted requirements for recording the manufacture and transfer of firearms and delegated to the Secretary of the Treasury authority to prescribe rules and regulations to carry the law into effect.[140] The intent of Congress in these Acts was to supplement state law enforcement authority in controlling handguns by imposing federal requirements on manufacturers, importers, dealers and collectors of firearms. The act insures that adequate records would exist and appropriate licensing standards could be applied.[141]

138/ Supra, notes 1-2.

139/ Not suprisingly, the Warren Commission made no recommendation on gun control; the Oswald investigation produced a record of self-control within the industry which was unusually complete. Again, this appears to be a product of the shock to the national conscience at the time of the assassination, not a general practice of the industry.

140/ P.L. 90-351, Title IV, 82 Stat. 226, June 19, 1968 (Omnibus Crime Control and Safe Streets Act of 1968); as amended, P.L. 90-618, 82 Stat. 1214, October 22, 1968 (Gun Control Act of 1968); as amended P.L. 93-639, 88 Stat. 221F, January 4, 1975, 18 U.S.C. §§921-928 (1970, Spp. 1975), Explosives control was added, P.L. 91-452, 84 Stat. 952, October 15, 1970, 18 U.S.C. §§841-848 (1970, Supp. 1975), in the same vein as gun control and will be analyzed parenthetically.

141/ P.L. 90-351 at §901; P.L. 90-618 at §101.

The Act specifically provides for application for a license from the Secretary of the Treasury before engaging in business as a firearms importer, manufacturers or dealer, and delegates authority to prescribe the manner and information required in the application.[142/]

The granting of licenses is relatively ministerial since only five statutory requirements need to be met and since a cause of action in mandamus is permitted after exhaustion of administrative appeals.[143/] The heart of licensing lies in the information required in the application by the Secretary and the lengths to which the statutory requirements are investigated.[144/] The Act also requires the maintenance of records and reports as the Secretary may require and provides for inspection of records and firearms during business hours.[145/] The provision for inspection of licensed premises without a warrant was specifically upheld in United States v. Biswell.[146/] The particular records which licenses must maintain present a composite method of tracing guns in the same vein as bank records trace quantities of money. Importers are required to maintain a permanent listing of the quantity, type, manufacturer, country of manufacture, caliber, model, serial number, license, to whom transferred and

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142/ 18 U.S.C. 923(a), (b) .

143/ 18 U.S.C. 923(c) - (f).

144/ Responsibility has been redelegated to the Director, Bureau of Alcohol, Tobacco and Firearms, 27 C.F.R. 70.1, 178.21 (1976).

145/ 18 U.S.C. 923(g) - (i)

146/ 406 U.S. 311 (1972). See, 2F C.F.R. 178.23, 178.121(b) (1977). See, also, Marshell v. Barlow's, Inc., - U.S. -, 46 U.S.L.W. 4478 (No. 76-1143, May 23, 1978).

date of transaction for each weapon imported.[147] Manufacturers must make a similar record of each weapon produced or acquired.[148] Dealers and collectors must maintain a ledger of weapon descriptions, including the type of mechanism (action) as well as acquisition and disposition data.[149] While these ledgers present a means of easily tracing a weapon through all licensees, it is the unlicensed customer which is by far the majority of purchasers of single weapons. For these transactions an additional record must be maintained either alphabetically, chronologically or numerically providing the purchasers name, address, date an place of birth, height, weight, race and certification of capacity.[150] Thus, until a firearm comes into the hands of its first non-licensee possessor, a complete record of possessions and transactions can be made out from required records.[151]

147/ 27 C.F.R. 178.122 (Form is set out in margin of cited section). Separate records must be maintained for transfers directly to a non-dealer or other non-license. 27 C.R.F. 178.122(d). See, 27 C.F.R. 178.125 (1977).

148/ 27 C.F.R. 178.123 (1977). Similarly, separate records must be maintained for all transfers directly to a non-license. 27 C.F.R. 178.123(d).

149/ 27 C.F.R. 178.125(e) (1977).

150/ 27 C.F.R. 178.124(c) (1977) In this case the certificate of capacity is the purchasers statement that he has not been convicted of any disabling crime, under indictment or legally a mental deficient or defictive. This certificate must be signed under oath. See, ATF Form 4473.

151/ It should be parenthetically noted here that records of sales of ammunition are also required in ledger form. Accordingly, a purchase of ammunition which does not conform to the caliber and action of a recorded purchase will raise some speculation as to its use. 27 C.F.R 178.125(a) - (d) 1977).

Generally, as already noted, licensees must keep their records available for inspection during business hours on demand, but very little is required to be reported voluntarily.[152/] The question of third party records retrieval is a special one in that records may be obtainable from ATF only to the extent already possessed or willing to acquire. Since the Act was intended to supplement state enforcement efforts, and since the Act contain no prohibition or inhibition to federal inter-agency disclosures,[153/] it is appropriate to turn to the state laws to determine the extent of availability of third party records and continued tracking of guns transfers between non-licensees.[154/]

b. State Statutes.

Nearly all states have some form of regulation for the purchase and possession of firearms.[155/] However, except for the actual permit to own a firearm to be obtained from local or state authorities, third party records tracing of a weapon becomes quite complex in all but a few states. Only two states re-

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152/ But, see, 27 C.F.R. 178.126a. (1977) (Reporting multiple sales or other disposition of pistols and revolvers).

153/ Federal give and take is quite common in this area, and the it permits precisely the kind of investigatin accomplished shortly after the Kennedy assassination. There appear to be no notification or process requirements involving these records under the Act to implementing regulations. In light of the Privacy Act of 1974, supra, notes 64-70, and accompanying text, the "primary role of ATF is called into question.

154/ 27 C.F.R. 178.25 provides for development and disclosure of information to state or local authorities on written request.

155/ See, generally, M. Ray, Handgun Control: Strategis, Enforcement and Effectiveness (1978) (MS:GPO).

quire a special identification card linking a particular weapon to the owner which must be kept with the weapon at all times.[156/] Only two states require private parties to report the sale of a firearm to local or state authorities, as a transaction, other than the more limited records that the new owner may need to make.[157/] Finally, no state requires the former owner to maintain a receipt or record of the sale, as contrasted with the federal recordkeeping requirements already discussed.

156/ This identification card is similar to a drivers license, complete with photographs, and a copy is maintain in centralized state files. 38 Ill. Ann. Stat. §§83-3, 83-4 (1978); 140 Mass. G.L.A. 122, 122A, 124B - 129D(1978).

157/ 140 Mass. G.L.A. 129C.(1977); Ohio R.C. 2923.20(a)(4). The variation in permits to own is diverse among the state from single notice of ownership of form of firearms to individual permits for each weapon.

H. Private Records

Another class of records which are useful in third party criminal or tax investigations consists of commercial records which are voluntarily maintained wholly for their commercial value, whether procedural or substantive requirements are prescribed by law or wholly left to standards of the industry. The key distinctions between these records are those discussed in Section G rest on the voluntariness of the original development of the records. Although Federal and State law is implicated in both examples - credit and telephone company billing - the initial development of the records is strictly commerical, not regulatory.

1. Fair Credit Reporting

Similar to cash flow needs, criminal and tax prosecutions may have need for reports on a prospective defendant's credit history to determine prosecutability. This is manifest in criminal and civil tax prosecutions and useful in white collar, computer, fraud and organized crime prosecutions.

The Fair Credit Reporting Act, adjunct to the Bank Secrecy Act of 1970, was designed to insure the accuracy and completeness of consume credit files held by credit reporting agencies or clearinghouses and reasonableness in the methods of obtaining information.[158/] The Act defines the rights of consumers and liabilities of credit reporting agencies, limits the kind of information held and the length of holding and restricts access and disclosure.[159/]

158/ P.L. 90-321, as added by P.L. 91-508, 84 Stat. 1127, October 26, 1970, 15 U.S.C. §§1681, et seq. (1976).

159/ 15 U.S.C. 1681 b, c, f, h, k, m, and r. (1976).

In particular, consumer credit reporting bureaus are prohibited from furnishing information on a consumer credit history except in three situation: 1) where disclosure is authorized by the consumer, 2) where the agency has reason to believe that the information is to be used solely in deciding whether to extend credit, insurance, employment licenses or other business transactions to the consumer, or 3) where a court so orders.[160] Material on background, associates, lifestyle, etc., is more restricted.[161] Consumer credit reporting bureaus are also generally prohibited from reporting information more than seven years old.[162] Specifically exempted from these strictures is a report to any requesting governmental agency which contains only the consumer's name, address, former addresses and employment history.[163] Finally, on request, a consumer must be informed of all receipients of an consumer report on the consumer in the last six months preceding the request;[164] apparently including all governmental investigatory bodies.

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160/ 15 U.S.C. 1681b (1976).

161/ 15 U.S.C. 1681a(e); 1681d; 16812.

162/ 15 U.S.C. 1681c. (Bankruptcy - 14 years; judgements - statute of limitations on the judgement or seven years, whichever is longer). Section 1681c (5) providers: "Records of arrest, indictment, or conviction of a crime which, from date of disposition, release, or parole" antedates the report by more than seven years shall not be disclosed. Since a bureau becomes liable for extensive damages for disclosing incomplete or obsolete information, 1681; 1681n, 1681o, pose a higher premium on this disclosure than on erroneous or incomplete disclosures by the originator criminal justice actor, such as the F.B.I. Compare, supra notes 73-77, and accompany text.

163/ 15 U.S.C. 1681f (1976). Hoke v. Retail Credit Corporation, 521 F.2d 1079 (4th Cir., 1975), cert. denied U.S. 1976)

164/ 15 U.S.C. 1681g(a)(3)(B) (1976). Millstone v. O' Hanlon Reports, Inc. 528 F. 2d 829 (8th Cir., 1976).

Under this statutory scheme the FTC, the major enforcer of the Act,[165] was initially required to obtain a court order to obtain consumer reports in a compliance investigation, but this requirement was reversed on appeal since the availability of such information was a necessary incident of the FTC's enforcement power.[166] The Internal Revenue Service has also sought information from banks which have unsuccessfully invoked the FCRA to proscribe compliance with the administrative summons.[167] This may be explained in part by reading the FCRA and the Bank Secrecy Act as titles of one legislative enactment. Unresolved is the availability of consumer reports to the lesser enforcement agencies, since the rationale prohibiting one agency and permitting the other was implicit in the statutory scheme.[168] Equally unresolved is the question of whether the FCRA grants the consumer an implied cause of action or substantial proprietary or other interest in order to intervene and object to a subpoena duces tecum or administrative summons.[169]

165/ 15 U.S.C. 1681c. (1976).

166/ 169 U.S. App. D.C. 271, 515 F. 2d 988 (1975). ("Though we rule that the FTC may obtain consumer reports by administrative subpoena in enforcing the Act, we find implicit in the statutory scheme of the FCRA the caveat that the Commission is prohibited from using information which it obtains... for any other purpose than carrying out its enforcement duties under the Act" Id. at 998.

167/ United States v. Bremicker, 365 F. Supp. 701 (D.C.D. Minn., 1973); United States v. Puntorier, 379 F. Supp. 332 (E.D. N.Y. 1974). The clear language of the statute nonwithstanding, the courts may require disclosure in a clearer case. Cf. 4 CCH Consumer C.G. F11.305. See, TRA 1205, supra, notes 52-60, and accompany text.

168/ FTC v. Manager, Retail Credit Co., supra, note 166, at 998.

169/ See, United States ex rel Weinberger v. Equifax, Inc., 557 F. 2d 456 (1977).

2. Telephone and Telegraph Tolls and Pen Registers

One of the most useful, as well as most troubling, means of investigating complex criminal activity is through the interception of telephone calls or telegrams; appropriately complex legislative, executive and judicial regulation of the practice has been designed to balance competing needs.[170] In this subsection, however, attention is focused on a slightly less cumbersome access to pre-existing toll records and local call ticker tapes, and, tangentially, pen registers and call tracers.[171] So far as Constitutional law becomes a question in the acquisition of telephone company records, analysis would follow in the line of thought evident in California Bankers Association, Donaldson, Miller and Biswell.[172] In essence, the courts would not find a reasonable expectation of privacy in these records and have not extended the Fourth Amendment standards to them.[173]

Statutory constrictions are limited to disclosure to unauthorized persons. Section 605 of the Communication Act of 1934, in pertinent part, proscribes disclosure except to the addresses or persons within the communications business for accounting or distributing purposes or court subpoena or "demand of other lawful authority."[174] Most commonly, investigators will be interested in actual toll

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170/ 18 U.S.C. 2510-2518: (1970, Supp. 1976); U.S. Attorneys Manual 9-7.013 (December 16, 1977). Katz v. United States, 389 U.S. 347 (1967).

171/ Primary concern here is for pre-existing records, but this can not be divorced from records developed at the behest of, or by, law enforcement authorities. These can be divorced, however, from actual interception. See, infra, notes , and accompanying text.

172/ Supra, notes 85, 54, 27 and 16 respectively.

173/ See, e.g. United States v. Hughes, 441 F.2d 12 (5th Cir., 1971), cert denied 404 U.S. 849 (1971); United States v. Kohne, 347 F.Supp. 1178 (MD. Pa., 1972).

174/ P.L. , 48 Stat. 1103, June 19, 1934, as amended, P.L. 90-351, Title III, 82 Stat. 223 June 19, 1968; 47 U.S.C. 605 (1970, Supp. 1976).

records, but a question remains as to what records may actually be obtained. Secondly the means by which such records may be obtained must be considered.

Other than actual toll records, the telephone company often institutes internal investigations to insure the accuracy of tolls, thus producing special documentation, and actual interceptions, in the course of locating "blue boxes" or touch-tone encoders.[175/] Material developed in the course of these business investigations is admissable evidence unless later procedurally tainted.[176/] In the case of telegraph companies, the entire message becomes a record in the possession of the telegragh company subject to possible acquisition by law enforcement authorities.[177/] In both cases the records may indicate an on-going relationship in which the telephone or telegraph company is not interested, and which, without other information not available from these sources, may be meaningless. Historically these facilities have been significantly utilized in the narcotics traffic, policy and numbers, fraud, check kiting, and arbitrage and equalization tax evasion. Actual interception, recording and transcription of conversations by the telephone company may be forwarded to law enforcement

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175/ A "blue box" on touch tone encoder permits the user to circumvent the toll recording equipment in long distance calls. See, e.g. United States v. Hanna, 260 F.Supp. 430 (S.D. Fla., 1966), reversed, 393 F.2d 700 (5th cir., 1968), affirmed an rehearing 404 F.2d 405 (5th Cir., 1968); United States v. Clegg. 509 F.2d 605 (5th Cir., 1975).

176/ United States v. Clegg, supra; United States v. Barnard, 440 F.2d 907 (9th Cir., 1973), cert denied, 416 U.S. 959 (1974) Nolan v. United States, 423 F. 2d 1981 (10th Cir., 1969), cert denied 400 U.S. 848 (1970).

177/ If the content of the telegram was incriminating the defendant could not claim the Fifth Amendment privelege because he was not compelled to make it. See, United States v. Gross, 416 F.2d 1205 (8th Cir, 1969); Newfield v. Ryan 91 F.2d 700 (5th Cir., 1937) cert denied 302 U.S. 729 rehearing denied, 302 U.S. 777 (1937).

authorities without violating Section 605 or Title III of the Omnibus Crime Control and Safe Streets Act.[178]

The actual acquistion of these records poses a slightly different problem. First the existence of the records must be brought to the attention of the appropriate authorities, but, at the same time, collusion in making these records must be avoided.[179] This requires some cooperation on the part of the telephone and telegraph companies. Should this fail, and the authorities do become aware of the existence of useful records, the appropriate search warrant, grand jury subpoena or other court order,[180] or administrative subpoena or summons[181] must be invoked. While the courts have avoided construing the statutory language of the latter exception, "on demand of other lawful authority," the plain meaning of this language requires proof only of the propriety of the administrative process used.[182]

Up to this point analysis have been strictly limited to pre-existing records, but in this case it is necessary to digress into the creation of records through use of the pen register. The use of pen registers has been widely and

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178/ P.L. 90-351, Title III, 82 Stat. 112, June 19, 1968, as amended, P.L. 91-358, 84 Stat. 654, July 29, 1970, 18 U.S.C. 2510-2520 (1970 Supp. 1976). United States v. Clegg, supra, note 176; United States v. Auler, 539 F.2d 642 (7th Cir., 1976) (rehearing and rehearing en banc denied). See 18 U.S.C. 2511(2)(a).

179/ United States v. Clegg, supra, note 176; United States v. Auler, supra.

180/ Section 605 specifically permits such demands. 47 U.S.C. 605.

181/ The language about to be discussed excepts disclosure "on demand of other lawful authority. 47 U.S.C. 605. Cf. 18 U.S.C. 2517.

182/ Newfield v. Ryan, supra, note 177.

authoritatively held to be outside the parameters of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[183] The rationale of United States v. New York Telephone Co. and and other cases consistently is that pen registers do not intercept the aural contents of communication; it only records the source and receiving telephone numbers. Furthermore, New York Telephone involved the application to a District Court for an order to use a pen register which would have complied with Fourth Amendment search warrant standards,[184] and held that sufficient authority existed for such an order.[185] The real issue in New York Telephone, which does not need to be reached in the present discussion, was whether the District Court had authority to require private parties to assist in the operation of the pen register.[186] The significance here lies in the finality of determination that pen registers fall outside the requirements of Title III and Section 605, and the authority to utilize the technique.

One additional tangent needs to be briefly surveyed: recording of wire communication by one the parties to that particular communication. While this "record" is available to law enforcement authorities under the same legal processes as if in the possession of the telephone company, special note should be made of

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183/ United States v. New York Telephone Co., -- U.S. --, 46 U.S.L.W. 4033 (No.76-835, December 7, 1977). See, especially, cases collected at note 9, slip. op. p.6. See, Sen. Rep. No. 1097, 90th Cong. 2d Sess, p.90 (1968).

184/ Id. at 4034.

185/ Id. at 4035-4036. Authority is based on Title III, the All Writs Act (28 U.S.C. 1651) and F.R. Crim. P. 41(b), 57(b).

186/ On this issue, the Court split 5-4. See, 46 U.S.L.W. 4036, opinion of the Court, per White, J.; 46 U.S.L.W. 4038, Stevens, J., dissenting, joined by Brennan and Marshall, JJ; Stewart, J. concurring in part and dissenting in part. Cf. Zweibon v. Mitchell, 170 U.S. App. D.C. 1, 516 F.2d 594 (1975), cert denied 425 U.S. 944 (1976).

the legal posture of this record. Under the rationale of consent, the recording is not subject to Fourth Amendment strictures;[187] under the rationale of lack of compulsion, the recording is not subject to the Fifth Amendment privelege.[188] Such recording is excepted from the strictures of both the Federal Communication Act and the Omnibus Crime Control and Safe Streets Act.[189] While the recording of such communications by a party who is a law enforcement officer is specifically exempted[190] and has proven effective,[191] the Executive has limited its use.[192]

187/ Supra, notes 23-26 and accompanying text.

188/ Supra, notes 33-40 and accompanying text.

189/ 47 U.S.C. 605; 18 U.S.C. 2511(c)(2)(d) (1970, Supp. 1976).

190/ 18 U.S.C. 2511(2)(c) (1970, Supp. 1976).

191/ Without this technique the Hoffa and White cases supra, would never have gone to trial. The Caceres case, infra, note 192, poses a special administration problem.

192/ See. United States Attorneys Manula, 9-7.013 (June 15, 1977). Cf. United States v. Caceres, 545 F.2d 1182 (9th Cir., 1976) (rehearing and rehearing en banc denied, opinion amended), cert granted, 46 U.S.L.W.

I. Trends in Third Party Record Law

Since the Kennedy assassination, and the unfettered third party records investigations which it spawned, the law balancing the rights of private parties to records which pertain to them and the needs of law enforcement for those records has developed significantly and almost totally. Congress has enacted and amended the Omnibus Crime Control and Safe Streets Act of 1968, the Gun Control Act of 1970, the Bank Secrecy Act of 1970 including the Fair Credit Reporting Act, the Privacy Act of 1974 and the Tax Reform Act of 1976. The Executive has promulgated appropriate regulations and staff instructions to carry these provisions into operative effect. The Judiciary has contended with new factual situations and legal and Constitutional challenges in such cases cases as Andresen, Bellis, Biswell, California Bankers Association, Couch, Donaldson, Fisher, and Miller. From this governing process certain trends emerge.

First, there appear to be no significant Constitutional impediments to federal agencies utilizing third party records investigations techniques. Neither the Fourth nor Fifth Amendments provide adequate basis for challenge; the Fourth due to vicarious consent, the Fifth due to lack of compulsion.

Second, acquisition of third party records depends, in part, on the initial statutory basis for the records; the structure of this paper centers on this axis. As a general proposition, the greater the mandated records reporting requirements to the government, the greater will be the ease of acquisition by a non-recipient of required reports. This is especially true of "fourth party" records, such as a bank's report of a customer's transfer to the Secretary of the Treasury being acquired by the SEC. Conversely, "first party" reports, e.g. tax

returns, pose a special difficulty: first because of the proximity of the party, and second because of the special requirements of a voluntary tax system.[199/]

Third, a premium has been placed on accuracy in third party intra-governmental records transfers. While the Privacy Act of 1974 prescribes a procedure for ensuring accuracy, it exempts the most controversial and fluid problem: criminal histories. Neither the authorization for FBI record keeping nor the courts have successfully grappled with this question. The Fair Credit Reporting Act imposes a higher standard of care on one type of user of much information and imposes liabilities for using inaccurate or obselete information. It would appear that if a trend exists in this underlying issue, the trend is merely to raise it as an issue.

Fourth, notification poses a special problem in third party records investigations since it may give the individual an opportunity to thwart enforcement. No federal statute is known to prohibit voluntary notification of a person that records pertaining to him have been summoned by an investigative authority.[200/] Notification on request is required by the FCRA, whether this disclosure would serve to inadvertently notify or confirm suspicious or hearsay. Notification is required when the IRS issues an administrative summons to a third party record holder. Where an important interest is perceived in a record, the more likely a right of notification or access will be granted.

199/ The second reason is undoubtedly more important, but this example is the most readily available Federal records submission. In the states, the best example would appear to be registration of firearms by the possessor.

200/ This includes the grand jury process. A witness may be admonished not to communicate his grand jury testimony to a putative defendant, but there is no sanction against doing so.

Fifth, notification leads necessarily to attempts at intervention. Here a consistent trend exists to deny intervention, with the exception of tax summonses.

Finally, federal pre-exemption poses a special trend - a non-trend. Where a federal interest is exclusively administrative, e.g. federal taxation, there is no question of state legislation. Outside of that instance, federal legislation has avoided pre-emption - intentionally or inadvertently - and the courts apply a rule of construction to foster non-pre-emption if possible. This leads to a more highly developed privacy right in some states and more restrictive access to some records; while in others the opposite may be true.

J. Contemporary Legislative Proposals

Unlike the dearth of bills associated with the trilemma in Chapter II, third party records acquisition and confidentiality has proved a fertile ground for the introduction of legislation. No less than 43 original bills have been introduced in the House and 5 in the Senate thus far in the 95th Congress. Due to the complexity of individual bills, which would only be compounded by any consolidated analysis, each bill will be summarized individually unless that bill has been incorporated in a later introduction.

H.R. 10076 is an omnibus bill consolidating the ideas of sixteen previous bills in the legislative recommendations of the Privacy Commission, although all remain viable.[201/] Title I of the bill establishes a Federal Information and and Privacy Board, gives the Board investigative authority over compliance with the FOIA, Privacy Act, Sunshine Act, Fair Credit Reporting Act, and other laws, as well as transnational data flow, electronic funds transfer, criminal history and other information.

Title II of the bill substantially rewrites the Privacy Act of 1974, as amended. The key to the new provisions is the removal of the "primary function" test for criminal law enforcement agencies and an increasing stress on accuracy through procedural restraints.[202/]

201/ H.R. 10076, introduced November 11, 1977 by Mr. Preyer, Mr. Koch and Mr. Goldwater, consumes the following House bills: 9989, 9986, 9982, 8288-8879 1985, 434 and 433. See, also: H.R. 3070, Introduced February 2, 1977, by Mr. Rouselot (for himself, Mr. Symms and Mr. Morehead of California), (financial), H.R. 2603, Introduced January 27, 1977, by Mr. Patterson of California. See, Privacy Protection and Study Commission, Personal Privacy in an Information Society, 371-379 (1977).

202/ H.R. 10076, Tit. II.

Title III of H.R. 10076 includeds general provisions for acquisition of third party records. Consent would generally be required under procedures requiring a signed and dated writing.[203/] Administrative subpoenas would be required to be served on the subject of investigation who would then have the right to object and intervene in enforcement proceedings. Administrative subpoenas to third parties would be limited to instances where there exists reasonable cause to believe that the subject has violated a Federal law.[204/] The use of search warrants to obtain third-party records would not be effected by this bill.[205/] Judicial subpoenas may be obtained, under the bill, on a showing authority and reasonable cause to believe the subject has violated a federal law; the subject must be notified and an opportunity to intervene is implicite.[206/] The judicial subpoena is construed to include subpoenas issued in the course of a grand jury as well as discovery.[207/] The bill provides that no administrative or judicial subpoena, or search warrant can be issued for personal papers, such as business records of a sole proprietorship.[208/] Grand Jury subpoena are additionally restricted when personal records are subpoenaed, requiring 1) an actual presentment to the grand jury for the limited purpose of indictment, 2) return or destruction

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203/ H.R. 10076, 303.

204/ H.R. 10076, 304.

205/ H.R. 10076, 305.

206/ H.R. 10076, 306.

207/ H.R. 10067, 306(b).

208/ H.R. 10076, 307.

of the documents if not used for the limited purpose or sealed in the minutes of the grand jury and 3) maintenance by prosecuting authorities of the record only if used.[209] A specific right to challenge subpoenas is granted and material improperly obtained is excluded from evidence under the bill.[210] The bill also prohibits disclosure of information acquired to other agencies or use other than the purposed of the subpoena.[211] Exceptions to these provisions include material and examinations by supervisory agencies.[212] The remainder of the title provides for jurisdiction, civil and criminal liabilities, and definitions.[213]

Title IV of the bill authorizes the Secretary of HEW to promulgate bases for state ligitation to protect individual's and conditions Federal public assistance and social services financing on compliance.[214] Title V would amend the Social Security Act to insure the limited use of medical files and information, grant access to the patient with an opportunity to dispute or correct the information, and notification to the patient of all uses of the information.[215] Title VI extends the scope of the Fair Credit Reporting Act to

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209/ H.R. 10076, §308.

210/ H.R. 10076, §§309, 310, Statutes of Limitation are stayed during subpoena litigation. Id at §311.

211/ H.R. 10076 §312.

212/ H.R. 10076 §313.

213/ H.R. 10076 §314-317.

214/ H.R. 10076, Title IV, §§401-404

215/ H.R. 10076, Title V, §§501-502. These titles are dealt with summarily due to their limited utility or consequence in law enforcement. Cf. H.R. 2593, Introduced January 27, 1977, by Mr. Kildie.

independent credit card and authorization services, as well as adding procedures for depository and insurance businesses.[216/]

Title VII of the bill would amend the procedure for acquisition of Federal tax return information by other Federal law enforcement officials by requiring the head of the agency or department to bring a civil suit against the taxpayer for a determination by a court that the tax return information may be disclosed. The court may grant the determination of it finds; 1) probable cause of a violation of Federal law, 2) probable cause that the return information is probative evidence of the issue, 3) acquiring the information from the taxpayer would not be prohibited as a matter of law, and 4) the information cannot be reasonably obtained from a source other than the IRS.[217/] The title would also expand disclosure to local tax authorities, require states to provide privacy legislation on tax matters and eliminate disclosure of information to corporation commissions.[218/]

216/ H.R. 10076, Title VI, §§601-605. This general extension brings additional sources of information within the strictures of the FCRA and its disclosure restrictions, but does not substantivity after the restrictions.

217/ H.R. 10076, §706. Amending 26 U.S.C. 6103, discussed supra, notes The section would also provide for in camera review, taxation of costs, expedition of proceedings, finality of judgement, stay of mandate and preservation of the Secretary's discretion not to disclose, but, see, H.R. 1493, Introduced January 6, 1977 Mr. Hagedom.

218/ H.R. 10076, §703. The title would also alter examination of prospective Presidential appointees and permit access to child support agencies at §704, 705. Title VII would amend the educational privacy provisions of the General Educational Provision Act and d the Buckley Amendment.

H.R. 9909 would prohibit federal officials, other than the supervisory agencies from acquiring records from financial institutions except by administrative or judicial subpoena, or search warrant.[219] The procedure for acquisition by administrative or judicial subpoena is substantially the same as in H.R. 10076, except, in the case of a judicial subpoena, notice to the subject may be delayed by the court for 90 days if it is satisfied that such notice would "seriously jeopardize a continuing investigation of any felony".[220] In the case of a search warrant, notice of the acquisition must be given to the subject within 90 days following service of the warrant unless the court orders extention is above.[221] Other provisions limit access the purposes for which the information was obtained, exempt agencies with supervisory functions to the extent of those functions and provide jurisdiction and remedies.[222]

H.R. 8746 would amend Section 6103 of the Internal Revenue Code to permit disclosure to the Secretary of HEW the of mailing address of persons who have defaulted on student loans made under the Higher Education Act of 1965.[223] H.R. 8539 would amend Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, by eliminating the one party consent to wiretapping and recording provisions and requiring the consent of all parties.[224] H.R. 8133 is substantially

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219/ H.R. 9909 introduced November 2, 1977, by Mr. Cavanaeigh.

220/ H.R. 9909, §§7, 9; especially 9(b).

221/ H.R. 9909, §8.

222/ H.R. 9909, §§10-17.

223/ H.R. 8746, introduced August 3, 1977, by Mr. Waggonner.

224/ H.R. 8539, introduced July 26, 1977, by Mr. Latta. See, supra, notes 187-192. and accompanying text.

the same as H.R. 9909 except that no restriction would be added to the use of search warrants to acquire information other than currently imposed by law.[225]

H.R. 7406 is divided into three titles - I. Confidentiality of Financial, Toll and Credit Records, II. Mail Covers and III Amendments to [Wire Interceptions Statute].[226] Title I, covering banking, telephones and credit, is similar to H.R. 9909 in general prohibitions, consent and search warrants.[227] While similar in the area of administrative subpoenas, this bill would exempt the IRS from the notice requirements when determining assets and tax liabilities.[228] The provisions for issuance of judicial subpoenas and delay of notice are similar to the later bill, H.R. 9909, except it is applicable as an authorization only for investigation at certain enumerated offenses.[229] Access to other agencies is prohibited except where authorized by statutes.[230]

Title II of H.R. 7406 proscribes mail covers without written authorization of the Chief Postal Inspector, a regional postal inspector or inspector in charge who has good cause to believe the mail cover is necessary to a felony investigation; except on request of the Attorney General.[231] Approved mail covers would be limited to 30 days with extensions up to one year; longer periods must be authorized

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225/ H.R. 8133, introduced June 30, 1977, by Mr. Cavanaugh (for himself, Ms. Oakar, Mr. Leach, Mr. Reuss, Mr. Rousselot, Mr. Patterson of California, Mr. Derrick, Mr. Hannaford, Mr. Patterson of New York, Mr. Barnard, Mr. Caputo and Mr. Stark.

226/ H.R. 7406, Introduced May 24, 1977, by Mr. Whalen (for himself, Mr. Harris and Mr. Neal.). See, also, H.R. 5903, Introduced April 4, 1977, by Mr. Zhalen.

227/ H.R. 7406, §§4, 6.

228/ H.R. 7406, §5. Compare TRA 1205, supra, notes 52-60.

229/ H.R. 7406, §7; especially 7(c).

230/ H.R. 7406, §9. Exceptions, jurisdiction, civil remedies and costs are the same. §§10-13,

231/ H.R. 7406, Title II,

by a judge.[232] Under the bill, emergency authorization can be granted, but formal authorization must be acquired within 48 hours.[233] Notice to the subject would be required within 90 days after termination of the mail cover and complete files would be maintained by the chief postal inspector for not more than eight years.[234]

Title III of the bill would amend the communication industry practices to limit the interception of employee calls to training uses and limiting service interceptions or interceptions to prevent theft of service.[235] The criminal sanctions in this area are also rewritten.[236] Title IV prescribes criminal penalties for violation of the provision of the bill.[237]

H.R. 2612 would provide for concurrent notice of subpoena for any telecommunications records by amending and adding to Section 605 of the Communication Act of 1934.[238] Notice of such a subpoena may be delayed by court order if notice would permit an individual suspected of criminal activity to escape prosecutions, would result in destruction of evidence or would cause a risk of life, or if the information is sought to protect national security and obtain foreign intelligence information.[239]

232/ H.R. 7406, §3.

233/ H.R. 7406, §4.

234/ H.R. 7406, §§5, 6. See, Reporting Requirements, 7; Civil Remedies (damages) 8. Cf. H.R. 7341, introduced May 23, 1977, by Mr. Kildee, and H.R. 7139, introduced May 12, 1977 by Mr. Kildee.

235/ H.R. 7406, Title III, §1.

236/ Id. at 2, 4.

237/ H.R. 7406, Title IV.

238/ H.R. 2612, Introduced January 27, 1977, by Mr. Patterson of California.

239/ H.R. 2612, §3.

A variety of additional prior bills exist in the House which are more tangentially related to either third party records or government investigations. These, however, present no significant additions the substantive options under discussion. In the Senate a small number of bills represent less complex issues.

S. 2293 provides for disclosure of depository financial records on service of 1) administrative subpoena after notification and intervention is waived or subpoena enforced, 2) a search warrant after notification, or 3) an ex-parte court order requiring disclosure.[240/] Such an order must be based on a finding that notification may lead to concealment, destruction or alteration of the records, would prevent communication of the records through intimidation, bribery, or collusion, or permit flight to avoid prosecution, testimony, or production of records.[241/]

S. 2096 parallels financial records aspects of H.R. 10076 and H.R. 9909, in many respects, but significant differences remain.[242/] The bill require notification and permits intervention in the case of administrative subpoenas, does not effect search warrants, and permits delay in notification and intervention in the case of felony investigation if serious jeopardy can be shown.[243/] The bill would not effect IRS procedures under TRA 1205, grand jury

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240/ S. 2293, Introduced November 4, 1977, by Mr. McIntyre.

241/ Id.

242/ S. 2096, Introduced September 14, 1977, by Mr. Cranston (for himself, Mr. Tower, Mr. Anderson, Mr. Bayh, Mr. Church, Mr. Haskell, Mr. Hatfield, Mr. Huddleston, Mr. Humphrey, Mr. Leahy, Mr. Johnston, Mr. Matsunage, Mr. Morgan, Mr. Percy, Mr. Riegle, Mr. Thurmond and Mr. Sparkman). See, also, S. 1460, Introduced April 28, 1977, by Mr. Tower (for himself, Mr. Barn, Mr. Lugar and Mr. Schmitt.).

243/ S. 2096, §§7-9.

subpoenas, supervisory functions, statistical reports or tax reports.[244/] Inter-agency access to record acquired in prohibited.[245/]

S.14 is a parallel to H.R. 7406.[246/] This bill includes confidentiality, notification and intervention of financial, toll and credit records; the use of mail covers and wire communication interceptions.

244/ S. 2096, §10.

245/ S. 2096, §11.

246/ S.14, Introduced January 10, 1977, by Mr. Mathias.

K. Alternative Considerations

Rather than attempt to fill in the alternations not covered by proposed legislation, it would appear more useful to organize the field of all alternations into a form through which the issue can be considered as a whole. The outline and matrix which follow are intended to supply a framework on which legislative alternatives on the privacy investigative efficiency issue within the context of third party records can be effectively discussed.

1. Accuracy: an implicite goal in both privacy and investigative concerns

    a. Verification of information sources: initial accuracy

    b. Notice to the person

    c. Challenges to accuracy by the person

    d. Amendments proposed by the person

    e. Expungement or correction

    f. Obsolescence

    g. Notice of changes to previous third party acquires

    h. Civil and criminal liabilities

2. Acquisition

a. Options in acquisition.	b. Forms of acquisition. (1) Informal oral requests from individual agents.	(2) Written requests from head of agency.	(3) Administrative subpoena or summons.	(4) Judicial subpoena (discovery or trial).	(5) Grand jury subpoena.	(6) Search warrants.	(7) Civil suits for declaratory judgement.	(8) Other
(1) Standards of care in initiation. (A) Authority to initiate. (B) Reasonable cause. (C) Probable cause.								
(2) Notice to person subject of records. (A) Concurrent with service to recordkeeper (B) Concurrent with return of service/inspection. (C) Delayed notification. (i) Likelihood of: (a) Destruction of evidence (b) Interference with process. (c) Flight. (ii) Length of Delay: (a) Original. (b) Extensions. (iii) Prohibition. (D) Prohibition of notice by recordkeeper.								
(3) Intervention to challenge. (A) Authority to issue (B) Relevancy to investigation. (C) Service. (D) Stay of execution.								
(4) Return of service. (A) Agency. (B) Actual.								
(5) Use. (A) Limitation to acquisition. (B) Maintenance. (C) Seal (D) Return or destruction.								

3. Acquisition from governmental agency
   (repeat consideration of 2.)

From this outline and matrix all the basic options can be applied to the federal government across the board or selectively, agency by agency. So long as the ridimentary constructures of the Constitution are not violated, or as the Congress determines what the structures are, Congress is free to legislate.

IV. THE EXCLUSIONARY RULE AND REMEDIES

The presumed innocence or provable guilt of Lee Harvey Oswald would ultimately have revolved on relevant and competent eiidence. Part of competency, however, includes those legal policies which have an overriding importance to the use of evidence and would have excluded, or better precluded, evidence from the jury's consideration. In a trial of Lee Harvey Oswald the Constitutional Exclusionary Rule would have played an important part, as will be shown, and may have any precluded final jury determination. The material to be discussed in this chapter may have aborted a trial before it began in a way similar to the problems suggested in Chapter II, and would control the use of evidence acquired by the means discussed in Chapter III, including the current legislative proposals in that chapter.[1/]

Initially the Exclusionary Rule was Constitutionally mandated to unlawful searches and seizures,[2/] but the proposition has grown along two distinct lines: 1) The type of conduct included under its umbrella of applicability, and 2) he legal basis for its prohibition and egregiousness of violation. On the first axis, the rule has extended from searches and seizures to include confessions and identifications. On the second axis, the rule has extended from Constitutional grounds to statutory, regulatory and, tentatively, customary grounds. The concept of matrix analysis may thus be useful in this context.[3/]

1/ Compare, Chapter III, Section K, with Chapter IV, Section

2/ See, infra, Section B.

3/ See, infra, Section C1.

This chapter will proceed through the potentials on the basis of authority: Constitutional, statutory, regulatory or customary in analyzing the traditional area, as well as supplemental areas. Thus, in reaching legislative alternatives, the broadest potential jurisdiction will be included. To supplement that jurisdiction, proposals which are not currently under consideration within the Congress, or which logically follow from the analysis, will be brought in from outside sources.

Finally, a word must be said about the operation of suppression as a remedy in criminal cases. When a case is the focus of wide-spread attention of the general populace, suppression is only valid so long as the evidence has not been previously publicized. This was a major concern of Chapter II. Similarly, pressures mount from one viewpoint in such cases to read the exclusionary remedies narrowly and permit broader latitude in the introduction of evidence, counterbalanced by the pressures from another to construe the exclusionary remedies broadly and limit the use of damaging, but plausibly improper, evidence to avoid later reversal. These pressures tend to reinforce the special nature of such a trial; the potential reactions to the suppression of evidence thus cannot be underestimated.

A. The Facts in the Oswald Case

A variety of bones of contention arise from the arrest, detention and investigation of Lee Harvey Oswald which could result in exclusion or suppression of evidence. The potential for recurrence is obvious from the flood of reported decisions, only to be underscored by the larger universe of cases plea bargained to dispose of the issues.

Other then third party records searches, which have been discussed, the Dallas police made two important searches: 1) the search of Oswald incidental to his arrest, and 2) a search of the Paine residence. Oswald was arrested approximately one and one-half hours after the Kennedy assassination, for the intervening murder of Patrolman Tippit.[4/] The police actions were based on the suspicions of two citizens who had observed Oswald's activities just prior to entering the Texas theater and knew of the deaths of President Kennedy and Patrolman Tippit.[5/] One of these witnesses pointed out Oswald in the near empty theater when police arrived. When approached by the police, Oswald drew his revolver and a scuffle ensued.[6/] When Oswald was searched at the time of his arrest a forged selection service card in the name of "Alek J. Hiddell," with a picture of Oswald affixed, was seized.[7/] Oswald was also searched approximately two hours later and five cartridges were seized.[8/]

4/ WCR, at 48, 176-180.

5/ WCR, at 176-178.

6/ WCR, at 178-179.

7/ WCR, at 181, 571-577.

8/ WCR, at 198.

On the same afternoon, police officers arrived at the Paine residence where Oswald and his wife lived. After asking and receiving permission from Mrs. Paine, and after translation from Mrs. Oswald, the officers searched Oswald's possessions and seized various items including a blanket in which the rifle had been stored.[9/] Mrs. Oswald also answered a variety of questions through Mrs. Paine as translor.[10/]

After Oswald was arrested, he was questioned by police and FBI officials for a total of about twelve hours.[11/] At the first interview, Oswald indicated a desire for, and was advised of his right to, an attorney.[12/] The right against self-incrimination was first discussed at the second interview.[13/] According to the investigative reports, Oswald provided little evidence which would have been useful at trial during these interviews.

On four occasions Oswald was taken before individuals who were potential witnesses for the purpose of identification.[14/] In each lineup, Oswald was handcuffed into an array of four men, and at each he was positively identified.[15/]

The question of whether Oswald was adequantely afforded his

9/ WCR, at 128-133.

10/ WCR, at 125-129.

11/ WCR, at 199-200, 589-636.

12/ WCR, at 200, 602. Inquiry was also made by the ACLU and the Dallas Bar. Id. at 201.

13/ WCR, 614, 619, 621, 625.

14/ WCR, 199-200, 166-169.

15/ Id.

legal rights is one only impliedly answered by the Warren Commission.[16] Since much of the legal development of those rights occurred subsequent to Oswald's death, attention must turn to that development.

16/ WCR, 201.

B. The Exclusionary Rule

The concept that evidence obtained in violation of the Constitutional proscription of unreasonable searches and seizures could not be used at trial was first enunciated as dicta in Boyd v. United States.[17] In Boyd, the court assumed that this concept was conventional wisdom and hence the dicta was not conceived as a new or compelling rule. That assumption failed, however, and the Court, utilizing its supervisory power, declared a formal rule for the federal courts in Weeks v. United States.[18]

> The efforts of the courts and their officers to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. ... To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.
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> We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of constitutional rights of the defendant. ...In holding them and permitting their use upon the trial, we think prejudicial error was committed. [19]

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17/ 116 U.S. 616 (1886). but, see, Adams v. New York, 192 U.S. 585 (1904) (Reciting the common law tort remedy).

18/ 232 U.S. 283 (1914).

19/ 232 U.S. at 293-294, 308.

The proscription of the Fourth Amendment were applied to the states through the Fourteenth Amendment in Wolf v. Colorado,[20] but the remedy for violation was left to the individual states. Since the efficacy of excluding evidence as a means of enforcing the Fourth Amendment was unknown, the Court sought to permit the states room to develop methods other than the Federal remedy.[21] The rule was applied directly to the states in Mapp v. Ohio[22] in light of a substantial formalization of the rule by the states. The rule became complete, with the basis ascribed to it by the court:

> The right to privacy, when conceded operatively enforceable against the states, was not susceptible of destruction by violation of the sanction upon which its protection and enjoyment had always been deemed dependent. ... Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches - state and federal - it was logically and constitutionally necessary that the exclusion doctrine - an essential part of the right of privacy - be also insisted upon as an essential ingredient of the right.... [23]

The countervailing line of thought holds that the "exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence [implementing the Fourth Amendment]"[24]

20/ 338 U.S. 25 (1949).

21/ 338 U.S. at 29-31.

22/ 367 U.S. 643 (1961).

23/ 367 U.S. at 652-653.

24/ 338 U.S. at 33 (Black, J., concurring).

This structure of the Rule poses the first of many problems. The Court has constructed the rule within the framework of a Constitutional mandate and it must be considered whether this affirms the Rule as Constitutionally exclusive of all other remedies. In the sense of direct Constitutional violations -- especially in the area of coerced confessions -- it is probably true that no alternative exists which would meet Constitutional standards. When the Constitutional prohibition is not violated by the substance of the evidence or where a lesser legal standard is violated in acquiring or using the evidence, a significant amount of room is left for alternatives to the exclusion of evidence.

Three bases have traditionally been cited for the exclusionary rule. The first basis is that of judicial integrity evident in Weeks and other cases. The second basis is strictly evidential: the good to be obtained by the use of the evidence is outweighed by the prejudice or harm allowed in using it. The third basis, and the most prominent contemporary thought, is found in deterrence: that the conduct which was violative of the defendent's rights will be deterred if the fruits of that conduct are imcompetent at trial. This third theory has led to significant attacks on the rule's efficacy and well as the rule itself. On any of these bases, Congress has a significant role to play: especially in the Constitutional construction of the rule as a co-ordinate interpreter. In light of the judicial intergity concept Congress may reconstruct the courts' theory of integrity as it has the courts' jurisdiction. In light of the evidentiary concept Congress may alter the rules as it has done in the past. And in light of the deterrence concept, Congress may provide more effective alternatives.

C. Scope of the Exclusionary Remedy

The Exclusionary Rule has been most troubling recently in terms of whether the Rule will deter improper actions in a given situation. The Court appears to be solely concerned with deterrence rather than with the Constitutional theory, judicial integrity or evidentiary values.[25/] Given the basis for this deterrence need - misconduct of some kind - it is easiest to consider the scope of the Rule and corrollary remedy in the context of individual actions and the authority violated.

This section will consider, summarily, the variations of authority and violations which lead to invocation of the remedy.[26/] The types of authority can be dissected into four: Constitutional, statutory, administrative or customary. The subject matters centered from the definitional search and seizure and traditional confessions and identifications to failure to procure administrative authorization for using entirely lawful techniques.

25/ United States v. Janis, 428 U.S. 433, 447-454 (1976).

26/ Matrix analysis would prove useful in a more complex study of the applications of the exclusionary remedy and suppression doctrine, but given the limited resources available at this time, it can only be considered summarily. In this case, one axis would constitute the various levels of authority: Constitutional, statutory and court rules, administrative regulations, and custom. The second axis would be constructed of the various substantive issues, such as search and seizure, self-incrimination, etc. From this type of analitical potential, the remainder of the section proceeds on the declining levels of authority to demonstrate the pervasiveness of the remedy's use without attempting to present a complete review of the potential substantive issues.

1. Constitutional Grounds

The Exclusionary Rule is effective to deter improperly warranted searches such as obtained from an interested magistrate[27] or lacking probable cause[28] or particularity,[29] or execution of properly acquired warrants by exceeding the scope of the warrant.[30] The Rule is further intended to deter all warrantless searches and seizures except when narrowly drawn exigent circumstances make the acquisition of a warrant impractical -- such as the flight of a person with the evidence.[31] The circumstances which would be so exigent have recently been all but eliminated by a change in the Federal Rules of Criminal Procedure, under the approval procedures by Congress, allowing for the application for a search warrant through sworn oral testimony by telephone or other means;[32] thus making the acquisition of a warrant possible in all but the most extreme circumstances from a Federal magistrate. Searches incidental to arrest and for the protection of the officer are per-

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27/ Coolidge v. New Hampshire, 403 U.S. 443, 449-451 (1971); Mancisse v. DeForte, 392 U.S. 364 (1968).

28/ United States v. Ventrusca, 380 U.S. 102 (1965); Giordanello v. United States, 357 U.S. 480 (1958); Aguilar v. Texas, 378 U.S. 104 (1964).

29/ Marron v. United States, 275 U.S. 192 (1927)

30/ Kremen v. United States, 353 U.S. 346 (1957); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); United States v. Di Re 332 U.S. 581 (1948). Ker v. California, 374 U.S. 23 (1963). See, also, 21 U.S.C. §879(b) (1970, Supp. 1976).

31/ Carroll v. United States, 167 U.S. 132 (1925); but, see, Chambers v. Maroney, 399 U.S. 42 (1970).

32/ Pub. L. 95-78, 91 Stat. 319, July 30, 1977, §2(e), amending Rule 41(c) of the Federal Rules of Criminal Procedure.

mitted.[33] Consent would waive the warrant requirement, but consent must be given voluntarily[34] and with knowledge of the right to refuse;[35] consent can be given vicariously.[36] The ambit of the Rule, like the Amendment, extends to include intangibles such as private conversations.[37] As a matter of continuity, one sovereign may not use in any criminal trial evidence obtained by another sovereign in violation of the Fourth Amendment.[38] This does not extend to evidence obtained by private parties on their own volition[39] or prohibit use in civil cases.[40]

The close relationship of the Fourth and Fifth Amendments produced the tentative beginning of the Excusionary rule in Boyd:[41] a compulsory

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33/ Chimel v. California, 395 U.S. 752 U.S. 757 (1969); Harris v. United States, 331 1945 (1947). Terry v. Ohio, 392 U.S. 1 (1968)

34/ Bumper v. North Carolina, 319 U.S. 543 (1968).

35/ Johnson v. United States, 333 U.S. 10 (1948); Amos v. United States, 235 235 U.S. 313 (1921).

36/ Bumper, supra (spouse - consent valid); United States v. Matlock, 415 U.S. 164 (1974) (mistress - valid); Frazier v. Cupp, 394 US. 731 (1969) (co-tenant valid); Chapman v. United States, 365 U.S. 610 (1961)(landlord-invalid); Stoner v. California, 376 U.S. 483 (1964)(hotel clerk invalid).

37/ Katz v. United States, 389 U.S. 547 (1967); Berger v. New York, 388 U.S. 41 (1967). Fourth Amendment not applicable when one party consents to recording of the conversation, either in person or telephonic. United States v. White, 404 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966); Lopez v. United States, 373 U.S. 427 (1963); 18 U.S.C. §2511(2)(c).

38/ Elkins v. United States, 364 U.S. 206 (1960). See, Listig v. United States, 330 U.S. 74 (1949).

39/ E.g. United States v. Pryba, 163 U.S. App. D.C. 389, 502 F.2d 391 (1974) cert. denied, 419 U.S. 1127 (1975); United States v. Lamar, 545 F.2d 488, rehearing denied, 547 F.2d 573 (5th Cir. 1977), cert. denied, 430 U.S. 959 (1977).

40/ United States. v. Janis, 428 U.S. 433 (1976) (insufficient deterrent value).

41/ Supra, n. 7

production of papers which is likened to both self-incrimination[42] and search and seizure. While the Fourth Amendment argument was later rejected, approved and, finally institutionalized,[43] the Fifth Amendment never altered. The ex-exclusion of evidence acquired in violation of the Fifth Amendment's proscription of compelled self-incrimination poses all three the rationale of deterrence, the reliability of the evidence and the perception of a mandatory constitutional remedy.[44]

The remedy of exclusion, as applied to confessions, presuming some defect, initially and historically rested on reliability or trustworthiness.[45] Beginning with Lisenba v. California, however, it began to develop the standard under a constitutional approach with the Fifth Amendment privilege as the essential ingredient.[46] While the common law approach had relied upon the "voluntariness" of the statements, the constitutional approach developed more heavily into a due process set of rules. In Malloy v. Hogan, the court unitized the state and Federal rules in the only way possible, through the Fifth and Fourteenth Amendments.[47] Although voluntariness was

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42/ See, supra, Chapter III, notes 28-45, and accompanying text. Compare, the required records doctrine, Shapiro v. United States, 335 U.S. 1 (1948) (first party), United States v. Sullivan 274 U.S. 259 (1927), with, Chapter III, Sections C and D.

43/ Adams and Weeks, supra.

44/ This, of course, restates the three theories under which the court's have labored. In this case, however, the deterrence effect is subliminal.

45/ See, e.g. White v. Texas, 310 U.S. 530 (1940); Chambers v. Flordia, 310 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

46/ 314 U.S. 219 (1941).

47/ 378 U.S. 1 (1964).

still a major part of the operative decision-making, the Court articulated specific rules to reinforce the individual's ability to assert his rights - to put the accused and government in parity - in Miranda v. Arizona:

> Our holding will be spelled out with some specificity ...but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned. 48/

Beyond these warnings, as indicated by their content, is the issue of waiver.[49/] The operation of the Miranda rule was set aside by Congress within the con-

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48/ 384 U.S. 436, 444-445 (1966).

49/ Again a voluntary, knowingly and intelligently given test has developed.

text of federal courts, but a measure setting aside its operation in state courts failed.[50] As the only course of controlling the operation of the courts, and especially in light of the exposure at trial of any confession, voluntary or involuntary, to the preclusion of fairly determining that very issue of guilt, the exclusionary remedy becomes a constitutional requisite.[51] To permit any involuntary confession to go to the jury in any way defeats the very purpose of Fifth Amendment.

The right to the assistance of counsel guaranteed by the Sixth Amendment poses several potential situations for the exclusion of evidence, most notably lineups and pre-trial proceedings. The right to counsel was first formidably interpreted in Powell v. Alabama though the holding was narrowly circumscribed: "[I]n a capital case, where the defendant in unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy or the like it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law...."[52] In Johnson v. Zerbst, the rule was extended to require appointed or retained counsel for the accused in all federal cases.[53] An absolute right to counsel in state trials was rejected

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50/ Pub. L. 90-351, 82 Stat. 197, 18 U.S.C. §3501 (1970, Supp. 1976).

51/ Jackson v. Denno, 378 U.S. 368 (1964); Lego v. Twomey, 404 U.S. 477 (1972).

52/ 287 U.S. 45, 71 (1932) (the Scottsboro case).

53/ 304 U.S. 548 (1938).

in Betts v. Brady,[54] which was, in turn, overruled by Gideon v. Wainwright.[55] Gideon extended the Sixth Amendment's command to the states in all felony cases through the Fourteenth Amendment.[56] More recently the Court has extended the right to include misdemeanors[57] and reasserted the proposition that it is a right which can be waived.[58] These cases all deal with the formal setting of trial, where the potential for use of the exclusionary remedy exists, but the cause for invoking the remedy in a situation where lack of counsel is the grounds inherently occurs pre-trial.

In Escobedo v. Illinois the court held that evidence obtained during interrogations at which the accused and his counsel were separated and not allowed to communicate was inadmissable as violative of the Sixth Amendment.[59] The Escobedo decision was quickly overshadowed by the requirements of Miranda, joining of the Fifth and Sixth Amendments,[60] but the extension of the exclusionary remedy to in-custody interrogations which violated the right to counsel remained in force as a Sixth Amendment interpre-

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54/ 316 U.S. 455 (1942). Cases after Betts followed a "special circumstance" line of reasoning which would permit appointment of counsel if the court felt it was necessary, but did not require it.

55/ 372 U.S. 335 (1963).

56/ An otherwise unanimous Court divided on the theory of application.

57/ Angersinger v. Hamlin, 407 U.S. 25 (1972) (misdemeanors; petty offenses for which imprisonment not possible are not included and reserved.

58/ Faretta v. California, 422 U.S. 806 (1975)

59/ 378 U.S. 478 (1964). See, Kirby v. Illinois, 406 U.S. 682 (1972).

60/ Supra, note 48.

tation after the Miranda rules were changed.[61]

In 1967 the Court decided the Wade-Gilbert-Stovall trilogy of cases. United States v. Wade stands for the proposition that the right to counsel extends to post-indictment line-up identifications and that in-court identifications subsequent to a line-up without counsel should not in every case be suppressed.[62] The thesis, necessarily, is that only counsel can assure that future testimony will not be tainted by a suggestive or otherwise improper lineup. Gilbert v. California made the exclusionary rule in Wade a per se rule, thus denying any potential independent evidence since the taint, once developed, could not be remedied.[63] Stoval v. Denno restricted application of the Wade-Gilbert rule to prospectivity.[64] While the Constitutional demand for counsel is obvious, the basis for the rule is not only unclear, but it may include all the discussed possibilities:

> "Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup. In the absence of legislative regulations adequate to avoid the hazards to a fair trial which inhere in lineups...the desirability of deterring the constitutionally objectionable practice must prevail

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61/ Supra, note 50.

62/ 388 U.S. 218 (1967). The Court also held that there was no Fifth Amendment self-incrimination issue in line-ups.

63/ 388 U.S. 263 (1967).

64/ 388 U.S. 293 (1967). Thus Oswald would have reaped no benefit had he been convicted.

over the undersirability of excluding relevant evidence. 65/

Unlike in-custody interrogations without counsel which would implicate the Fifth Amendments' ban on compelled self-incrimination, the exclusion of testimony tainted by improper identification clearly emanates from the Sixth Amendment alone, if on a constitutional theory at all.

2. Statutory Authority and Court Rules

It is less cumbersome to deal with exclusions which do not emanate from the Constitution, and, correspondingly, consideration can be more fruitful. Two types of exclusions immediately call for attention: the McNabb-Mallory Rule and the wiretapping statutes.

The McNabb-Mallory Rule requires that a person taken into custody must be presented before an appropriate judicial officer without unnecessary delay" 66/ The basis for the rule is clearly not Constitutional; the supervisory power of the Court over litigation within the inferior courts and, hence, is not applicable to the States as a Constitutional rule would have been. 67/ McNabb-Mallory clarified Rule 5 of the Federal Rules of Criminal Procedure, and has since been reiterated within the Federal Rules. The exclusion remedy

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65/ Gilbert, supra, note 63 at 273. Congress modified the Wade-Gilbert rules in the Federal Realm in 1968. 18 U.S.C. 3502. (1970, Supp. 1976). It is not essential that Congress consider actions within the realm of one theory to the exclusion of others. See, also, Simmons v. United States, 390 U.S. 377 (1968).

66/ McNabb v. United States, 318 U.S. 332 (1943), Mallory v. United States, 354 U.S. 449 (1957).

67/ McNabb, supra, at 340. Congress also has modified the McNabb-Mallory Rule, 18 U.S.C. 3501(c)(1970. Supp. 1976). Cf. Culombe v. Connecticutt, 367 U.S. 568 (1961). Nor is it likely that the rule will be transformed as in McCarthy v. United States, 394 U.S. 459 (1969) and Boykin v. Alabama, 395 U.S. 238 (1969).

had been invoked in early cases consistently lowering the permissible period between arrest and presentation before a magistrate.[68] It would appear that the rule, as a per se exclusion, also prohibits derivative use of evidence obtained, although there is little directly controlling law on the point since most McNabb-Mallory violations were formal confessions.[69] In this case it is possible to eliminate the evidentiary reasoning since no real question of reliability has been raised after the initial rule was institutionalized; subsequent cases have been based on a narrow adherence to the rule and deterrence from deviating.[70]

Statutory exclusion of evidence is found in Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[71] The general purpose of Title III is to prohibit the interception of wire or oral communications by anyone other than those specifically authorized and not accomplished in accord with a specifically authorized judicial warrant.[72] Along with defining and generally proscribing wiretapping, the Act particularly excepts

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68/ Eg. Coleman v. United States, 115 U.S. App. D.C. 191, 317 F.2d 891 (1963) (10 hours-overnight); Seals v. United States, 117 U.S. App. D.C. 79, 325 F.2d 1006 (1963), cert. denied 376 U.S. 964 (1964) (unexplained 3 hours delay); Perry v. United States, 118 U.S. App. D.C. 360; 336 F.2d 748 (1964) (1 1/2 hour delay).

69/ See, e.g. United States v. Curry, 358 F.2d 904 (2d cir., 1964), cert. denied 385 U.S. 873 (1964).

70/ "Third degree" tactics were alluded to in McNabb but the lower court opinions enforcing the rule have operated on the efficiency of bringing the suspect before a judicial officer.

71/ Pub. L. 90-351, 82 Stat. 216, June 19, 1968, Title III, §802, 18 U.S.C. 2515 (1970, Supp. 1976).

72/ See, S. Rep. No. 1097, 90th Cong., 2nd Sess., 64-109 (1968).

judicial orders granted upon application approved by the Attorney General or a designated Assistant Attorney General under certain conditions.[73] The Act further provides:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."[74]

The exclusion of evidence developed contrary to the Act was intended by Congress as "an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards...will sharply curtail the unlawful interception of wire and oral communications."[75] The Court has given it a broader basis, supplementing deterrence: "...§2515 serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct; the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings.'"[76]

73/ 18 U.S.C. 2516, 2518 (1970, Supp. 1976).

74/ 18 U.S.C. 2515. The concept of derivative use - the "fruit of the poisonous tree" doctrine - is specifically introduced, but here, as noted above, the concept of derivative use extends the exclusionary remedies beyond the primary use until it is so attenuated as to lose validity.

75/ S. Rep. No. 1097, supra, note 72, at 90.

76/ Gelbard v. United States, 408 U.S. 41, 51 (1972). (§2515 provides defense to contempt for refusal to give grand jury testimony on illegal wiretap by victim).

The Act is easily interpretable as a constitutionally based exclusion in light of previous Court decisions holding wire communications within the ambit of the Fourth Amendment's protections,[77] but the Act goes beyond the minimum requirements of probable cause and search warrant requirements and stands independent of minimum constitutional mandates.[78]

Several other examples should be summarily noted. Before the Omnibus Crime Control and Safe Streets Act of 1968, interception of wire communications was controlled under the Federal Communications Act of 1934;[79] exclusionary remedies were not specified in the statute, but were required by the Court in Nardone v. United States[80] and, because the Federal statute was prohibitory, extended to the State enforcement effort in Lee v. Florida.[81] Also forcible entry by law enforcement authorities without notice of authority and purpose and direct refusal proscribed by federal statute,[82] and reiterated as common law of the District of Columbia,[83] provided the basis for extending

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77/ Supra, note 37.

78/ For example, the Act requires a specific finding that other techniques have failed or are reasonably likely to fail, before a judicial order for wire interception is permitted to issue. The constitution demanded only probable cause. See, 18 U.S.C. 2518.

79/ 47 U.S.C. 605. Cf, Supra, Chapter III, notes 174, 180-182 and accompanying text.

80/ 302 U.S. 379 (1937).

81/ 392 U.S. 378 (1968) (prior to passage of the Omnibus Crime Control and Safe Streets Act of 1968).

82/ 18 U.S.C. §3109 (1958, 1970).

83/ Accarino v. United States, 85 U.S. App. D.C. 394, 179 F.2d 456 (1949).

the exclusionary remedy to evidence obtained in its breach in Miller v. United States.[84/] In each case the underlying theory is clearly non-constitutional; but it is unclear whether the basis is deterrence or evidentiary.

3. Administrative Regulations

The incidence of exclusionary remedies for failure to comply with administrative regulations is limited by three intervening factors: 1) the number of agencies charged with criminal investigations or investigations which have a likelihood of resulting in criminal prosecutions, 2) the extent to which these agencies "regulate" their investigative techniques and 3) the actual prosecutorial response. Given these restrictions, the cases in which the exclusionary remedy is utilized represent no concerted legal doctrine which has been previously recognized.[85/]

A primary example of a violation of personnel regulations resulting in exclusion is United States v. Caceres.[86/] In Caceres an Internal

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84/ 357 U.S. 301 (1958).

85/ See, generally, Note, Violations by Agencies of Their Own Regulations, 87 Harv. L. Rev. 629 (1974). Cases involving delegated authority to promulgate legislative rules under APA, the violation which has resulted in suppression of evidence, have not been found. But, see United States v. Schwartz, 176 F. Supp. 613 (E.D. Pa., LU59), aff'd on other grounds, 283 F.2d 107 (3rd Cir., 1960), cert. denied, 364 U.S. 942 (1961) (Postal regulations (39 C.F.R. §3.1 (Supp. 1959)) violated; evidence not suppressed); United States v. Leonard, 524 F.2d 1076-1080 (2d cir. 1975) (Postal Manual violated: no suppression). This appears to be due to the minimal cross-over from purely administrative regulation to criminal investigation. Thus the remaining regulations are based on internal personnel control. See, L. Beck, The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy, 27 Am. U.L. Rev. - (1978).

86/ 545 F.2d 1182 (9th Cir., 1976) (petition for rehearing and suggestion of rehearing on banc denied, Januar 20, 1977), cert. granted --U.S.-- 46 U.S.L.W. 3753 (No. 76-1309, June 5, 1978). No Fourth amendment "privacy" grounds are applicable. Supra note 37.

Revenue Special Agent failed to obtain authorization from designated superiors at the IRS and Justice Department before recording conversations with a taxpayer, including the taxpayer's attempts to bribe the agent. While the court rested its approval of exclusion of the evidence on due process grounds, the government contended a mimimum basis existed in the internal regulation.[87] Court holdings are not uniform on the application of this regulation and its corrollaries.[88]

Another example is found in the IRS Intelligence division practice of giving taxpayers Miranda-type warnings and informing them that the agent's responsibility is for criminal tax investigations. Although not mandated by the Constitution,[89] some lower courts have suppressed evidence obtained at interviews when the agent has failed to closely follow this internal regulation.[90] Other courts have denied suppression motions when when the practice was substantially followed,[91] or have denied suppression

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87/ The government presented that issue as: "Whether it is proper to suppress otherwise admissable and probative evidence in a criminal case because of the government's failure fully to comply with an internal regulation that is not required by the Constitution or by statute." Petition for Certiorari, supra, note 86, at 2.

88/ See, United States v. Kline, 366 F. Supp. 994 (D.C.D.C. 1973). (SEC surveillance tapes).

89/ Beckwith v. United States, 425 U.S. 341 (1976).

90/ United States v. Heffner, 420 F.2d 809 (4th Cir., 1969); United States v. Leahy, 434 F.2d 7 (1st Cir., 1970); United States v. Sourapas, 515 F.2d 296 (9th Cir., 1975); (Suppression as to individual taxpayer; no suppression as to corporate taxpayer). United States v. Jobin, 535 F.2d 154 (1st Cir., 1976), (individual records before warning suppressed; all corporate records and individual records after warnings not suppressed).

91/ United States v. Bembridge, 458 F.2d 1262 (1st Cir., 1972); United States v. Morse, 491 F.2d 149 (1st Cir., 1974).

violation is evident on the grounds that suppression was inappropriate or that no due process rights existed,[92/] It is unclear whether Beckwith would have any effect on the lines of thinking represented since all cases deal with the personnel regulations on giving Miranda type warnings and not the Sixth Amendment.[93/] The potential for the development of the exclusionary remedy for violations of agency regulations, however, is clear, even where the regulations are internal and personnel oriented, or delegated authority from Congress.

4. The Extreme Incident: Custom

The exclusionary remedy was called into question on the Supreme

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92/ United States v. Leonard, 524 F.2d 1076 (2d cir., 1975), cert. denied 425 U.S. 958 (1976); United States v. Gentile, 525 F.2d 252 (2d cir., 1975), cert. denied, 425 U.S. 903 (1976); United States v. Robson, 477 F.2d 13 (9th cir., 1973); United States v. Potter, 385 F. Supp. 681 (D. Nev., 1975); United States v. Fukushima 373 F. Supp. 212 (D. Hawaii, 1975). Cf. Truett v. Lenahan, 520 F.2d 230 (th Cir., 1976), cert. denied, 427 U.S. 912 (1976). See, especially, United States v. Lockyer, 448 F.2d 417 (10th Cir., 1971) See, also, United States v. Mapp, 561 F.2d 685 (7th Cir., 1977).

93/ The Court of Appeals in Beckwith, U.S. App. D.C., , 510 F.Id 741, 743-744 noted:

> "Furthermore, the agents did give Beckwith a modified Miranda warning which while not in full compliance with Miranda does give the suspect some notice that his statements might be used against him (footnote quote omitted) the extent to which such a warning must be given is not implicated in this case."

Thus the Supreme Court did not need to concern itself with the issue, even to issue the disclaimer. It is also salient to note that there has been only one case after Beckwith: Jobin, supra, note 90.

Court's docket this Term in United States v. Jacobs.[94] The issue presented by the pretitioner was:

> "Whether a court of appeals possesses and should exercise supervisory power to suppress a defendant's allegedly perjurious grand jury testimony for the sole reason that the prosecutor neglected to follow the usual practice of other federal prosecutors in the circuit of giving target warnings to grand jury witnesses against whom the government has incrimination evidence." 95/

In terms of the remedy, the question was whether the court of appeals may extend it to cover such a purely supervisory setting, if the court has authority to rule in the first place. The Supreme Court's action in taking the case and then dismissing it after argument marks a significant approval of the remedy under the court's supervision.[96] The reversal of the court of appeal's decision would have marked further erosion of the Court's faith in the exclusionary remedies, or merely limits on the incidence of its use.[97] Such speculation would appear to rest on the perceived deterrent value of the case and the availability of alternatives - in this case, the Government's institutionalization of the practice.[98]

94/ 531 F.2d 87 (9th cir., 1976), 547 F.2d 772 (9th Cir., 1977), cert. granted, No. 76-1193, May 31, 1977, argued. Nov. 7, 1977, March 20, 1978, cert, dismissed as improvidently granted ____ U.S.____, 46 U.S.L.W. 4406 (May 1, 1970).

95/ Petition for Certiorari, p. 2; Brief for Petitioner, p.2, Respondents view of the question is responsive.

96/ I.e. Jacobs would extend McNabb-type supervisorry authority.

97/ See, e.g., United States v. Janis, supra, note 40.

98/ U.S. Atty. Man. 9-12.250 (December 16, 1977).

D. Limiting the Suppression Doctrine

The expansion of the exclusionary remedy was amplified by Mapp v. Ohio[99/] and reached its zenith between Mapp in 1961 and 1969. Since the inception of the Burger court, the suppression doctrine has continually been limited - the boundaries of growth clearly defined.[100/] Not only has the Court whittled away the periphery of the suppression doctrine but specific commentary on the continuing efficacy of the rule has become more evident.

Initially Justice Harlan called for the court to overrule Mapp so that the entire area of search and seizure could be re-evaluated.[101/] Justice Black had only recently reiterated the idea that the suppression doctrine was not part-and-parcel to the Fourth Amendment.[102/] In Bivens v. Six Unknown Named

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99/ Supra, note 22.

100/ E.g. Schneckloth v. Bustamonte, 412 U.S. 218 (19783 (consent search without warning of alternations); Cady v. Dombrowski, 413 U.S. 433 (1973) (lack of warrant not per se unreasonable); Cupp v. Murphy, 412 U.S. 291 (1973) (fingernail scrapings "highly evanescent"); United States v. Robinson, 414 U.S. 218 (1973) (search incident to arrest not confined to weapons); United States v. Calandra, 414 U.S. 338 (1974) (grand jury witness can't refuse to testify about illegally seized material); United States v. Peltier, 422 U.S. 531 (1974) (Almeida-Sanche v. United States, 413 U.S. 255 (1973), limited and not retroactive); United States v. Janis, supra, note 40; Stone v. Powell, 428 U.S. 465 (1976) (habeas corpus not available if suppression in state court only); United States v. Martinez-Tuerte, 428 U.S. 543 (1976) (fixed checkpoint border searches outside Fourth Amendment); South Dakota v. Opperman, 428 U.S. 364 (1976) (search of impounded vehicle reasonable); United States v. Donovan 429 U.S. 413 (1977) (suppression improper for failure to name of defendants in application for wiretap warrant).

101/ Coolidge v. New Hampshire, 403 U.S. 443, 490-491 (1971) (Harlan, J., concurring).

102/ Whiteley v. Warden, 401 U.S. 560, 572, (1971) (Black, J., dissenting, joined by Burger, C.J. and Blackmun, J., dissenting).

Agents of Federal Bureau of Narcotics the court created a tort remedy within the Fourth Amendment for unconstitutional searches and seizures.[103] While the action constitutionalized the common law,[104] Bivens did not present the issue in a posture of choice between the exclusionary rule and a tort remedy, and no such choice was made. In Chief Justice Burger's dissent to judicially creating a remedy, which he felt more appropriately the province of Congress, his understanding of the need for the rule becomes clear:

> "I do not question the need for some remedy and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric. Beyond doubt the conduct of some officials requires sanctions....But the hope that the objective could be accomplished by the exclusion of reliable evidence from criminal trials was hardly more than a wishful dream. Although I would hesitate to abandon it until some meaningful substitute is developed, the history of the suppression doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective. [105]

The Chief Justice's disenchantment with the Rule does not appear to be a minority view.[106] Whether the suppression doctrine should be discarded is not a question which is likely to be answered in simple terms or soon by the Court. Whatever the Court does will eventually effect both State and Federal jurisdictions; so long as the doctrine is founded in constitutional principles the alterations would appear to require slow, incisive actions. Congress, however is not so limited.

103/ 403 U.S. 388 (1971).

104/ See, Adams v. New York, supra, note 17.

105/ Bivens, supra, note 103 at 415.

106/ See, e.g. Janis, supra, note 40; Stone v. Powell, supra, note 99, at 538 White, J., dissenting).

E. Contemporary Legislative Proposals

Congress currently is considering a few measures which will either mitigate the need for the suppression doctrine or curtial its use through resort to methods not supportive of its use. However, no single bill, or group of bills, addresses the problem directly.

The major relevant considerations propose amendments to the Federal Tort Claims Act[107] which governs liabilities for torts by United States employees in the course of their duties. H.R. 9219 would amend the FTCA by including causes of action arising under the constitution and by removing the exception from assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process.[108] Other bills have taken a more restrictive view and expanded the FTCA only to include constitutional torts and torts committed by employees who routinely perform investigative, inspection, or other law enforcement and prosecution functions.[109] Both bills follow the line begun by Bivens and interpose the United States as the defendant waiving sovereign immunity.[110] A version of the same idea is represented in the Senate by S.2117 repeating many of the provisions of H.R. 9219.[111]

107/ 28 U.S.C. §§2671-2680 (1970). 62 Stat. 984, June 25, 1948, as amended.

108/ H.R. 9219, introduced September 20, 1977, by Mr. Rodino (by request).

109/ H.R. 9437, introduced October 4, 1977, by Mr. Zeferetti (for himself, Mr. Carter, Mr. Devine, Mr. Goldwater, Mr. Gilman, Mr. Kemp, Mr. Long of Louisiana, and Mr. Murphy of New York); H.R. 9191, introduced September 19, 1977, by Mr. Waggoner.

110/ Supra, note 163.

111/ S. 2117, introduced September 21, 1977, by Mr. Eastland.

These alterations of the FTCA provide a relatively narrow view of the spectrum of potential alternatives or supplements to the suppression doctrine.[112] Accordingly a broad based discussion of alternative and supplemental considerations based on external research is provided in the next section.

The most recent bill, S. 3014, provides for the specific abolition of the Exclusionary Rule in Federal criminal cases, but does not extend to statutory or supervisory exclusions.[113] The bill provides a civil tort cause of action in the District courts for victims of illegal searches and seizures with awards up to $25,000 for actual personal and property harm or damages as well as punitive damages; the latter are restricted to instances where criminal conviction of the defendant-now-plaintiff have not been obtained.[114] The bill further provides for appropriate agency discipline, after notice and hearing, including suspension without pay and outright dismissal and allows good faith as a defense.[115]

112/ Contrust this limited amount of activity with the previous sessions more complex bills: H.R. 5628, 94th Congress, by Mr. Steiger, H.R. 10275, 93rd Congress, by Mr. Steiger; H.R. 9623, 93rd Congress, by Mr. Podell; S. 801, 94th Congress, by Mr. Bentsen; S. 2657, 92d Congress, by Mr. Bentsen. But, see, Pub. L. 95-78, 91 Stat. 314, July 30, 1977. (permitting acquisition of search warrants by telephone).

113/ S. 3014, introduced April 27, 1978, by Mr. Griffin.

114/ S. 3014, §§2-4.

115/ S. 3014, §2: "2693".

F. Alternatives or Supplements to the Suppression of Evidence

In order to fully understand the ability to alter the Exclusionary Rule, the exclusionary remedy and the suppression doctrine, a variety of considerations must be kept in mind. The first of these is basic to the extent Congress might wish to act. Congress may alter the Federal Rules, as it has done in the past,[116/] thus altering the Federal practice, or it may effectively overrule Mapp v. Ohio through its authority to enforce the Fourteenth Amendment, thereby altering the more formidable state practices.[117/] A second question lies in whether Congress would abolish the doctrine or would supplement it in such a way as to relieve the courts of its use in all but a few cases. This necessarily requires some speculation as the effectiveness of Congressional action. A third consideration depends on whether Congress wishes to consider the Exclusionary Rule a constitutional doctrine or relegate it to the Court's supervisory authority while considering alternatives and supplements; the former would appear to require an action applicable to the States as well Federal enforcement efforts, while the latter gives more latitude for experimentation in only the secondary Federal realm. This consideration leads to a fourth question as to the extensiveness of the violations sought to be deterred. As already noted, the suppression doctrine has descended from consti-

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116/ E.g. Pub. L. 95-78, supra, note 32.

117/ Supra, note 22. Amendment XIV, Sec. 5; 18 U.S.C. 242 (1970); 42 U.S.C. 1983 (1970).

tutional grounds to violations of custom and Congress may wish to return the doctrine to narrower grounds.

In any event there are a limited number serious alternatives or supplements to be considered. The variations within these alternatives or supplements, however, consume considerable time.

1. Tort Liabilities

Tort liability was the only remedy before the development of the Exclusionary Rule and its progeny[118/] and has remained the most popular alternative. In Bivens, the Supreme Court constitutionalized this remedy for Fourth Amendment violations.[119/] The variations on tort liability are complex, but the primary question of deterrence within them remains unanswered.[120/]

Tort liability imposed on the individual official for his acts has historically been considered inappropriate. Beside the fact that a tort defendant is likely to be unable to pay any substantial damages, or is completely judgment-proof, significant procedural barriers have attended tort actions against the individual official, including preliminary expenses, potential good faith defenses and a significant lack of jury appeal. As a matter of public policy, Judge Hand summarized:

> "[I]t is impossible to know whether the claim is well founded until the case has been tried, and...to submit all officials, the innocent as well as the guilty, to the burden of a trial and the inevitable danger of its

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118/ See, Boyd v. United States, and Adams v. New York, supra, note 17.

119/ Bivens v. Six Unknown Named Agents, supra, note 103.

120/ See, generally, Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives, 1975 Wash. U.L.Q. 621, 690-713.

> outcome, would dampen the arder of all but the most resolute, or the most irresponsible in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to satisfy a jury of his good faith." 121/

The assertion of a Constitutional remedy under Bivens merely gets a plaintiff into court, no further. The same holds true of cases brought under the Federal Civil Rights statutes.[122/] The question inherently posed by the traditional tort remedy is in the amount of deterrence: deterring an official from unconstitutional or illegal actions without deterring the official from taking any action at all.

A second alternative would be to provide for governmental indemnification for violation of Constitutional rights. Ordinarily this would fall within the ambit of the Federal Tort Claims Act,[123/] but the Act specifically excludes "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution [or] abuse of process....[124/] Outside the provisions of the FTCA, the government must first formally waive its sovereign immunity before being susceptible to suit. Then the economic problem of trial interposes as already discussed. The deterrence value of a

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121/ Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir., 1949).

122/ 42 U.S.C. 1983, 1985 (1970, Supp. 1976). E.g. Rizzo v. Goode, 423 U.S. 362 (1977); Hampton v. City of Chicago, 484 F.2d 602 (7th Cir., 1973), cert. denied, 415 U.S. 917 (1974).

123/ 28 U.S.C. 2671-2680 (1970). See the proposed amendments discussed above in section E.

124/ 28 U.S.C. 2680(h)(8).

suit against the government is questionable-either to the government or the offending officer. It may also be argued that if an agency wants the conviction badly enough, it will accept the budgetary consequences to obtain it. Such a theory retains the premise of the tort theory to essentially "substitute subsequent cash payments for timely lawful behavior."[125/]

At least some of the initial questions of deterrence are answered by suits against both the individual officer and the government as joint tortfeasers.[126/] The plaintiff could recover from the government, who, in turn, for a wilful or reckless violation, could attempt collection from the individual. This latter collection has at least arguable deterrent effects, although these would substantially diminish as the time between violation and sanction increased.

Another option would place the legal and factual issues before an administrative review board for determination. Doing so may mitigate the problems of a civil trial as well as increase any deterrent effect from liability through more efficient processing. Questions of such an administrative body's authority and procedure must be answered somewhere between the quasi-judicial full trial of fact and law and a summary proceeding resulting from a suppression order. The formal hearing end of the spectrum could replace the entire suppression doctrine,[127/] while the latter is dependent on suppres-

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125/ Baade, Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch, 51 Texas L. Rev. 1325 (1971).

126/ See, Levin, An Alternative to the Exclusionary Rule for Fourth Amendment violations, 58 Judicature 74, 75-76 (1974).

127/ See, Bivens, supra, note 103, at 422-423 (Burger, C.J., dissenting).

sion and could increase deterrence (consequently, arguably, decreasing suppressions) if the issues were limited to determinations of fault among joint-tortfeasors and the assessment of damages. This would again raise questions of direct liability of officials or indirect liability through the governmental agency.

Similarly, the coverage of the remedy must be considered. A sanction dependent on suppression would effect only "close" cases which a prosecutor took into court, or, even more formalistically, those "close" cases where the prosecutor attempted to utilize the questioned evidence. Where the case is plea bargained, dropped or declined in the first place, a remedy must be considered to correlate with that involving attempted "use." It is possible to consider both procedures - a suppression res judicata and full trial on application within the same administative framework.

Finally the bullwark question of whether "the criminal goes free because the constable has blundered" must be addressed. In Bivens, Chief Justice Burger reiterated the idea of tort remedies as an alternative to the Exclusionary Rule rather than a supplement to mitigate its use: "Any such legislation should emphasize the interdependence between the waiver of sovereign immunity and the elimination of the judicially created exclusionary rule so that if the legislative determination to repudiate the exclusionary rule falls, the entire statutory scheme would fall."[128/] The Chief Justice appended to his dissent a tentative draft of the American Law Institute's Model Code of Pre-Arraignment Procedure emphasizing that the rule could be trimmed to

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128/ Id. at 423, n. 7.

allow suppression "only if the court finds that such violation was substantial."[129] The question of what constitutes a substantial violation, as with any subjective determination, would not relieve the courts of any burden, although it would eliminate those cases most vocalized: technical violations. With this concept, and a strict limitation to violations of constitutional rights, it is arguable that the suppression doctrine would be significantly eliminated as an issue, while violations would still receive attention in some manner as torts.

The question of a tort remedy is neither new nor simple. The possibility of a tort alternative, however, is the most popular warranting some attention in each Congress. To an extent, this popularity has impaired thinking about other alternatives or supplements, just as the Exclusionary Rule's existence may have impaired thinking about alternatives in the first place.

2. Criminal Sanctions

The basis for imposition of criminal sanctions for violations of the Fourth Amendment currently exists,[130] as do sanctions for conspiracy to violate Federal civil rights.[131] The fate of these sanctions will be considered with the criminal code reform presently under way,[132] but their

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129/ Id. at 424-425, quoting §§SS8.02(2),(3), pp. 23-24 (Tent. Draft No, 4, 1971). See, supra, notes 90-92.

130/ 18 U.S.C. §2235 (1970, Supp. 1976) (malicious procurement of a search warrant); 18 U.S.C. §2236 (1870, Supp. 1976) (search without a warrant); 18 U.S.C. §2234 (1970, Supp. 1976)(exceeding authority of warrant).

131/ 18 U.S.C. §245 (1970, Supp. 1976)(interference with federally protected interest).

132/ S. 1437, §1, "§§1501-1502," passed January 30, 1978; H.R. 6968, §1, "§§1501-1502," Committee on the Judiciary (Absorbing §§2234-2236 into the civil rights statutes).

use as an alternative or supplement to the exclusionary rule presents a special set of problems. While these sanctions are contiguous with the parameters of lawful searches, the elementary question of deterrence must be considered since reported cases construing the sanctions are rare, and probably few conviction have ever been obtained.[133/] The elementary construction problem exists in the limitation of the sanction against searches without a warrant to officers, agents and employees of the United States when searching a private dwelling.[134/] Thus, only a small percentage of Fourth Amendment violations are criminally proscribed.

The major problem with the use of this alternative or supplement should be evident from this experience: prosecutors are loathe to press charges against those with whom they must work and depend upon on a day-to-day basis.[135/] Pinning down this problem is difficult at best, but contemporary prosecution of present and former FBI officials serves to illustrate the point. More likely is the prosecution of an official for misappropriation for failure to inventory all materials seized since there is a broader base for support of such corruption prosecutions.[136/] While

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133/ A number of cases have attempted to rely on this section for restraints which it does not contain or personal remedies instead of the governmental remedy. No criminal convictions have been found under the section.

134/ 18 U.S.C. 2236. Section 2234 and 2235 do not have these limitations, but the incidence of such violations is probably significantly lower. The Civil Rights provisions present the special problems of conspiracy proofs which are still rarer occurrences.

135/ Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970).

136/ E.g. Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. Legal Studies, 243, 273 (1973).

considering methods of increasing the use of current sanctions or modifying the sanctions, one cannot escape the balancing problem of deterring unconstitutional actions and criminal behavior or deterring action completely.

Congress may wish to consider employing some of the devices it has used in the past to limit or visualize the prosecutor's discretion, such as mandatory enforcement or reporting reasons for non-enforcement.[137/] At the same time the scope of the criminal sanctions might be reconsidered. A further consideration would remove such prosecutions from the direct line of stress in the criminal process and would vest authority to prosecute elsewhere than the United States Attorneys.[138/] The utility of the criminal sanction as an alternative or supplement to the suppression doctrine could be increased in a variety of ways. It may also have tangentially beneficial effects for the victims of unlawful searches and seizures[139/] as well as to free evidence for use against them.

3. Summary Court Procedures

The possibility of utilizing a suppression order as res judicata of the essential facts of tort liability has already been mentioned.[140/] A

137/ E.g., 18 U.S.C. 2101(d), 3057(b) (1976).

138/ E.g., Special Prosecutions; H.R. 2711, 2835, 4292, 5949, 7916, 7234, 8125, 8538, 9705, 10669, 10868.

139/ An innocent victim may have the option of using a criminal conviction to prove all facts essential to its existence, see. F.R. Evid. 803 (22).

140/ Supra, at page 174.

criminal law corrollary is not constitutionally possible, but it is possible to expand civil contempt provisions to cover violations which come under the suppression doctrine.[141] A combination of these summary procedures might also be considered.

4. Disciplinary Procedures and Training

Given the premium on deterrence, the question of direct personnel controls disciplinary procedures, training and operational control necessarily arise. This set of alternative or supplements to the suppression doctrine raises the issue in executive, as well as legislative, terms. In considering this variety of actions a more developmental approach can be used.

It would seem axiomatic that if investigating officials were properly trained not to violate individual rights the suppression doctrine would be obsolete. While this may or may not be true, Congress or the Executive may wish to consider prioritizing funds such as within the Law Enforcement Assistance Administration of the Department of Justice - toward police training on constitutional rights and lawful techniques.[142] Much as the law continues to change, the training requirements would necessarily develop into a continuing legal education.

The continuing control of official actions can also be facilitated through introduction of guidelines, directives and general policies. It might well be argued that internal directives from superiors command more

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141/ 28 U.S.C. § .

142/ See, e.g., Geller, Enforcing the fourth Amendment: The Exclusionary Rule and Its Alternatives, supra, note 115, at 721.

respect than amorphous constitutional rights in the minds of individual officials, and the concept has received some attention from commentators, though not related to suppression.[143/] The development of such guidelines, however, raises the spectre of the doctrine as well as mitigating its utility; violations of guidelines more restrictive of actions than constitutionally mandated have resulted in unforeseen suppressions.[144/] This anomalous situation, both within the framework of altering or supplementing the suppression doctrine and on its own merit, may deserve attention by Congress.

Even training and supervisory guidelines tend to require some enforcement mechanism, and this may be especially true in an attempt to mitigate the amount of evidence unlawfully obtained and suppressed. Enforcement can be both positive[145/] and negative; the latter has historically prevailed. Internal discipline of officials has long been a subject of wide debate and public skepticism; experience teaches that it doesn't work, basically, for the same reasons that limit the use of criminal sanctions.[146/] External discipline - for example by the Civil Service Commission in the case of

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143/ See, Aaronson, Dienes and Musheno, Improving Police Discretion: Rationality in Handling Public Inebriates, 29 Ad. L. Rev. 447 (1977) 30 Ad. L. Rev. 94. (1978)

144/ Supra, notes 85-93, and accompanying text.

145/ See, Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternations, supra, note 115, at 720-721. Geller cites the idea of an incentive system as contrasted with a punitive system.

146/ Oaks, studying the Exclusionary Rule in Search and Seizure, supra, note 135 , at 709-710. See, supra, notes 131-132, and accompanying test.

federal officials or community based disciplinary boards in the case of local officials - have provided very mixed reviews.[147] Within the Federal Government disciplinary procedures are for the most part an internal affair ith the external review of an agency action usually in the courts rather than before the Civil Service.[148] A little attended variation on the external disciplinary proposition, though with added arbitrational powers, is the Scandanavian concept of the Ombudsman.[149] The Ombudsman concept tends to combine the internal authority of the government with external objectivity. An additional variation on discipline might combine these factors in a realignment of the investigator-prosecutor relationship. The mutual independence of these criminal justice actors has historically prevented the prosecutor from translating suppression of evidence into effective demands on investigatory agencies who set into motion the eventual use of the suppression doctrine. A realignment of roles - even between, and perhaps specially between, the FBI and the Department of Justice - may increase the deterrent effect of suppression and, in avoiding the errant practices, reduce its use. Legislative requirement could be devised in these areas, if Congress so desires, for either the Federal investigators or state and local police, through a variety of supervisory and financial techniques.

147/ E.g. President's Commission on Law Enforcement and the Administration of Justice: Task Force Report: the Police, 200-202 (1967).

148/ See, 5 U.S.C. 7501 , et seq. (1977).

149/ See, Oaks, Studying the Exclusionary Rule in Search and Seizure, supra, note 135, at 674; Davidow, Criminal Procedure Ombudsman as a Substitute for the Execlusionary Rule: A Proposal, 4 Texas Tech. L. Rev. 317 (1973).

Potential legislative action on the Exclusionary Rule, the exclusionary remedies and the suppression doctrine could take a variety of forms. Similarly, legislative intent could range from the abolition of the doctrine to supplements external to the doctrine, but with potentials for limiting its future use. The alternatives and supplements presented here represent a cross-section of the potential and are neither comprehensive or exhaustive. A reasonable range of action falls within these bounds.

V. CONCLUSION

Congressional response to the problems discussed in this study has been well within the bounds of both congressional authority and actual potential. This has been true in the fiteen years since the Kennedy assassination with the sole exception of the direction recommendations of the Warren Commission which were enacted.

In the area of free press - fair trial - speedy trial, Congress has made very limited interpretations of the Constitution. Even limitations such as the Speedy Trial Act[1/] have been for non-Constitutional purposes with less than Constitutional effect. Issues within the more narrow Federal realm, such as closure of court procedings[2/] have state corollaries[3/] raising the issue to the Constitutional dimension. Congress, however, need not approach these issues on the broadest base of applicability.

Congress has been more active, and probably will continue to be, in the area of third party records and privacy. With Section 1205 of the Tax Reform Act altering the law, and overruling United States v. Donaldson,[4/] Congress began a trend toward requiring additional, impartial review of the government's acquisition of records about a party without his consent[5/] at the

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1/ See, supra, Chapter II, notes 143-149, and accompanying text.

2/ United States v. Cianfrani, supra, Chapter II, note 111.

3/ Gannet v. DePasquale, supra, Chapter II, note 111.

4/ Supra, Chapter III, notes 46, 54-55, 57-58, and accompanying text.

5/ See, supra, Chapter III, Section K.

same time, congress has initiated a trend toward requiring greater accountability for such records and accuracy in their context.[6/] Contemporary legislative proposals mark a continuance of this trend, although only along procedural lines.

Finally, Congressional interest in reforming or abolishing the suppression doctrine has led to relatively sparse formal proposals. While the Supreme court has begun limiting the use of the suppression doctrine, the lower courts continue to expand its scope. At the same time, the state courts, where a vast majority of Fourth Amendment cases orginiate, have received little attention. While the Chief Justice has specifically articulated a need for Congressional action,[7/] only specific reforms and limited changes have taken place.[8/]

Historically, the interpretation of the free-press - fair trial dilemma, and the interplay of speedy trial rights, has been within the realm of the judiciary. The same has been true of the suppression doctrine. Only the newly introduced area of third party records and privacy rights has been founded on legislative mandates. None of these areas, however, is the sole province of the legislature, executive or courts.

6/ Supra Chapter III notes64-77, 158-169, and accompanying text.

7/ Bivens, supra, Chapter IV, note 103, at 424.

8/ See, e.g., Pub. L. 95-78, supra, Chapter IV, note 132, and accompanying text.